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National Labor Relations Board Overrules Nearly 40 Years of Precedent

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On November 8, 2024, the National Labor Relations Board (NLRB) overturned almost 40 years of precedent in its decision, *Siren Retail Corp d/b/a Starbucks*. This decision overruled *Tri-Cast, Inc.*, 274 NLRB 377 (1985) and reshaped the test utilized in determining the lawfulness of employer communications to employees concerning unionization efforts.

Tri-Cast and the Previous Standard

Tri-Cast has been the long-standing precedent and allowed employers to express thoughts on the impact of unionization on the employer-employee relationship. That standard deemed most employer statements about the effect of unionization to be categorically lawful. More specifically, it would not have been considered an unlawful threat to explain to workers that upon selecting a union to represent them, the relationship between them and management would change. Employers were permitted to voice that unionization would eliminate the employees' ability to address workplace issues and individually communicate their concerns with management.

The NLRB's Decision

Employers no longer have such categorical protection to make statements to their employees regarding the prospects of unionization. The Board reasoned its decision by criticizing the prior standard established in *Tri-Cast*, which "has since been applied broadly as a categorical rule to immunize nearly all employer statements concerning the relationship between individual employees and their employer." 373 NLRB No. 135 at 2.

Now, employer statements suggesting that employees could potentially lose privileges like an "open-door" policy with management will be assessed on a case-by-case basis. The Board majority determined that this approach strikes a better balance, safeguarding employees' rights without restricting employer speech protected under Section 8(c) of the National Labor Relations Act ("Act"), which permits employer statements as long as they do not contain "any threat of reprisal or force or promise of benefit."

This new case-by-case approach will be applied going forward in both representation and unfair labor practice cases. Under the Board's updated standard, employers may no longer make statements implying that direct access to management will end if employees vote to unionize. Referring to Section 9(a) of the Act, which grants recognized unions exclusive representation rights, the decision in *Siren Retail Corp. d/b/a Starbucks* clarifies that "the Act does not compel employers to end all direct interaction with individual employees over workplace issues if employees choose union representation." 373 NLRB No. 135 at 12.

As such, this decision is largely based on the Section 9(a) provision, which permits individuals or groups to "present grievances to their employer" independently, provided the union is "given opportunity to be present at such adjustment." The Board majority clarified that "employer statements that broadly predict that unionization will necessarily foreclose employees' ability to address issues individually with their employer are not

reasonable predictions about the legal consequences of unionization that follow from the Act." *Id.* Thus, per the Board's reasoning, warning employees that the relationship would change in a way that would not allow them to address issues with management would be a violation of the Act, and may be considered a threat of retaliation based on misrepresentation.

Takeaways

Given this decision, which effectively removes the categorical approach to employer statements about changes in employer-employee relationships post-unionization, **employers should exercise particular caution when drafting and finalizing campaign messages. Statements that were previously permissible may now be viewed as objectionable conduct or even an unfair labor practice.**

Following the recent U.S. presidential election, a reconstituted Republican-majority Board may eventually reverse this precedent-shifting decision, reflecting the Board's cyclical policy changes. However, any return to the *Tri-Cast* standard could take years. **In the meantime, employers facing union organizing efforts may encounter unfair labor practice charges and complaints over written and verbal statements that had been lawful for over 40 years.**

This decision marks the NLRB's first major shift since Donald Trump's election on November 5, 2024, yet the Board's future composition remains uncertain. The Senate has yet to confirm current Chairman Laura McFerran and Joshua Ditelberg; if they are confirmed before the current Senate adjourns, a Democratic majority could likely hold until the next vacancy in 2026. Otherwise, Trump may have the opportunity to tilt the Board to a Republican majority. With Chairman McFerran's term set to expire on December 16, 2024, further precedent-setting decisions in favor of unions and employees are expected in the coming weeks amid this period of uncertainty.

If you have any questions about this decision or any other labor & employment issue, please contact yourKnox Law attorney, our Labor & Employment group, or call us at 814-459-2800.
