



July 11, 2019

New Framework for Anticipatory Withdrawal of Recognition

On July 3, 2019, National Labor Relations Board (“NLRB” or “Board”) issued a 3-1 decision finding that Johnson Controls, Inc.’s anticipatory withdrawal of recognition to 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 the free choice of employees and resolve disputes of employees’ representational preferences.

Background

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 69 signed authorization cards from April 27, 2015 to May 7, 2015. Among the 69 signed authorization cards, six 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.

NLRB Decision

Under prior 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. The law resolved disputes over a union’s post contract majority status by utilizing the “last in time” rule under which the union’s 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.

Takeaway for Employers

New York City appears poised to follow other states such as California and New Jersey that have recently passed laws allowing striking workers to claim unemployment benefits shortly after declaring a strike. Employers are advised to consider how this significant shift in the cost of striking may affect their labor negotiations. At minimum, unions will be empowered to continue strikes in hopes of strengthening their bargaining positions.

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We are of course available to assist and provide counsel as these situations emerge.

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