Published on *The National Law Review* https://natlawreview.com

# Old Standard, New Challenges: The NLRB Restores 'Clear and Unmistakable Waiver' Standard

Article By:

William I. Amberger

The National Labor Relations Board issued its decision in *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024), in which it announced a major precedential shift: a return to the “clear and unmistakable waiver" standard. This shift may make it more difficult for employers to make changes to employee working conditions without union approval.

This decision overturns the NLRB's 2019 decision in *MV Transportation, Inc*., 368 NLRB No. 66 (2019), in which the NLRB jettisoned the long-standing “clear and unmistakable waiver” standard in favor of the more employer-friendly “contract-coverage” standard. Under the latter rule, an employer could make changes to workplace conditions--without engaging in collective bargaining--as long as those changes generally aligned with the management-rights clause of a collective bargaining agreement, even if the disputed employer action was not mentioned specifically in the contract's text.

With the *Environmental Solutions* decision, however, the NLRB has flipped again and resurrected the old clear and unmistakable waiver standard, which had been in place from 1949 until 2019.

While the clear and unmistakable waiver rule might be familiar territory, an old standard can raise new challenges for employers.

Under this more stringent and labor-friendly standard, an employer may only make a unilateral change to workplace conditions if there is clear and unmistakable language in the collective bargaining agreement permitting the proposed action. In other words, an employer is now required to demonstrate that a union has given a “clear and unmistakable waiver” of its right to bargain over specific changes being implemented for its unilateral change to survive NLRB review.

The NLRB champions its return to this standard as one that better accomplishes the goals of the National Labor Relations Act: to promote industrial peace by “encouraging the practice and procedure of collective bargaining.” The NLRB touts this decision as more consistent with U.S. Supreme Court and NLRB precedent.

Employers negotiating collective bargaining agreements should carefully evaluate their management-rights provisions and consider whether those provisions are now insufficient to enable them to implement unilateral changes without bargaining.

Notably, with the upcoming change in presidential administrations, the effect of *Environmental Solutions, LLC* may be ephemeral. If (or when) the NLRB comprises a Republican majority, we may be in store for another seismic shift as the NLRB looks for more employer-friendly opportunities, like a potential return to the contract-coverage standard.

> Today, the Board issued its decision in Endurance Environmental Solutions, LLC. and restored the “clear and unmistakable” waiver standard for evaluating employers’ contractual defenses to allegations that they have unlawfully changed the working conditions of union-represented employees without first giving the union notice and an opportunity to bargain.
>
> www.nlrb.gov/...



National Law Review, Volume XIV, Number 348