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NLRB makes it easier for employers to anticipatorily withdraw recognition

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On July 3, 2019, the National Labor Relations Board (NLRB) modified the legal framework in which an employer can anticipatorily withdraw its recognition from the union. Under well-established NLRB precedent, an employer could give notice of its intent to withdraw its recognition from the union when the collective bargaining unit (CBA) expires if it received evidence of the union's loss of majority support within a reasonable period of time before the CBA actually expires. However, an employer would do this at its own peril: if the union challenged the employer's claim of loss of majority status with an unfair labor charge and provided evidence that it reacquired majority status in the period of time between the anticipatory withdrawal and actual withdrawal of recognition, then the employer would likely be found to have violated the National Labor Relations Act (NLRA).

However, in its latest pronouncement, *Johnson Controls, Inc.*, the NLRB found the above framework to be unfair. Specifically, it allows the union's evidence to control the outcome even if the employer was correct that the union lacked majority status at the time the employer made the anticipatory withdrawal of recognition. Accordingly, the NLRB held that an employer may suspend bargaining and announce its pending withdrawal of recognition within 90 days of the expiration of the current CBA if it receives evidence that the union has lost majority support. If the union

wants to reestablish its majority status following an employee's anticipatory withdrawal, it will have 45 days to file a petition for a secret ballot election, as opposed to challenging the anticipatory withdrawal in an adversarial unfair labor practice proceeding. If the union does not file a timely election petition, then the employer may rely on its evidence of the union's loss of majority support. The NLRB believes this new framework properly protects employees' free choice regarding representation and promotes greater labor relations stability.

Additionally, under Johnson Controls, Inc., the NLRB provided guidance to employers about the impact of its new standard:

- Gap period between contract termination and union election. An employer that makes unilateral changes in unit employees' terms and conditions of employment during the gap between the date the contract terminates and the date of the election does not violate the NLRA, because the employees' showing of disaffection rebuts the union's post-contract presumption of continuing majority status. However, unilateral actions after the union files the election petition could constitute objectionable conduct warranting a second election if the union loses the first one.
- Unchallenged election loss by the union. The employer may make unilateral changes if the union loses the election and does not either challenge an outcome-determinative number of ballots or file objections to the election.
- Challenged election loss by the union. An employer risks violating the NLRA if it acts unilaterally after the union loses and files election objections and/or challenges a potentially determinative number of ballots.
- Employer challenges union election win. If the employer challenges a union win and is successful in obtaining a second election, but subsequently engages in unilateral action, then the employer's action could be grounds to allow a third election if the union loses.

Though this ruling provides a more favorable framework, employers should remain wary of engaging in unilateral actions before the closing of post-election matters. Otherwise, they run the risk of violating the NLRA and triggering a new election.