NLRB Limits Employers' Right to Inform Employees About the Negative Impact of Unionization on the Employer/Employee Relationship

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Discarding a near-40-year precedent, the National Labor Relations Board (NLRB or Board) issued *Siren Retail Corp d/b/a Starbucks* — only days after the presidential election. *Siren* overturns *Tri-Cast, Inc.*, a 1985 decision that upheld employer statements to employees that unionization could impact the direct relationship between them. This latest Board effort to redefine previously settled labor law will undoubtedly create confusion and make it more difficult for employers to accurately and effectively communicate with employees about the real effects of unionization. *Siren* only will apply prospectively.

Under the *Tri-Cast* decision, most employer statements about the impact of unionization on the relationship between employees and management were considered lawful, including statements informing employees that voting for a union could hurt the direct relationship between the company and its employees. The *Siren* decision, however, will now require such seemingly innocuous (and typically truthful) statements to be evaluated under the same standard as potentially unlawful threatening or coercive statements.

For employer predictions or statements to be lawful under this amorphous standard, they must:

- Be grounded in clear, objective facts.
- Convey a belief about likely outcomes that are not influenced by the employer's own actions.

Statements which fail to meet these criteria may be interpreted as illegal veiled threats or coercive statements. Employers will be challenged to meet this standard under the Biden Board.

Member Kaplan's Dissent

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In his dissent, NLRB Member Marvin Kaplan tartly responded to the Board's alleged reversal of *Tri-Cast* as follows: "This case would make Shakespeare proud. It is truly a decision full of sound and fury that signifies nothing." Kaplan cogently reasoned, "To my knowledge, the Board has never held that it has the ability to make law, let alone overrule precedent, based on an issue that is inarguably not before it." The scope and thrust of Member Kaplan's dissent is beyond the scope of this advisory. We raise it because it is likely *Siren* will be appealed to a federal court, and on appeal, the *Siren* decision is vulnerable post-*Loper Bright* (the case that changed the deference courts give to federal agencies). Member Kaplan's stinging dissent seems a blueprint for appeal.

Next Steps

It is expected the content of many employers' union awareness training programs (which attempt to educate supervisors on what they can and cannot say under the National Labor Relations Act) likely now may inadvertently run afoul of the new rudderless standard and will need to be reviewed and updated. There is some good news. Based on last week's presidential election results, change may soon be on the way. The second Trump administration, in time, will start to transform the NLRB (currently and unapologetically pro-employee/union) back to a more balanced and common-sense agency. Until that time, we anticipate a rash of NLRB pro-employee/union decisions being issued before the Trump administration takes over.

If you have any questions about this decision or the impact of the Trump administration on the NLRB, please reach out to the authors or any member of the Frost Brown Todd's Labor and Employment Practice Group.

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