



## NLRB Creates New Procedures for Ousting a Union

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July 2019

Last week, the National Labor Relations Board overruled portions of a 2001 decision and, as a practical matter, created a new procedure that an employer may follow when its employees indicate that they no longer wish for their incumbent union to represent them. See *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019) (overruling, in part, *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), and its progeny). This change is not without controversy, as Member Lauren McFerran wrote a vehement dissent to the Labor Board's 3-1 decision in *Johnson Controls*.

Under the previous *Levitz Furniture* rule, an employer acted "at its peril" by announcing that it would withdraw recognition from its employees' union upon expiration of a collective bargaining agreement. That was because the Labor Board applied a "last in time" rule in determining the intent of employees who told their employer that they no longer wanted to be represented by their union. The employer, not the union, bore the risk that employees might change their minds. Thus, when a collective bargaining agreement was about to expire, a prudent employer might continue to negotiate for a successor collective bargaining agreement, even when a majority of its employees were actively against the union supposedly negotiating on their behalf.

The *Johnson Controls* decision changes this. An employer now, as a practical matter, has a new option if it receives, within a specific window of time before expiration of a collective bargaining agreement, credible evidence that the union has lost majority support from employees. The employer may, under certain circumstances, opt to discontinue bargaining with its employees' union over a successor agreement and instead may notify the union that the employer plans to withdraw recognition from the union when the existing agreement expires. The *Johnson Controls* change is this: if the employer chooses to give such notice, the Labor Board will now place the burden on the union to petition the Labor Board for a secret-ballot election if the union wants to maintain its status as the employees' exclusive representative after the collective bargaining agreement expires.

Last week's *Johnson Controls* decision adds to a long line of precedents underscoring that secret-ballot elections, conducted under the auspices of the Labor Board, are the preferred method for deciding questions of union-representation. The *Johnson Controls* decision provides a new practical means to get to such an election, in addition to existing methods (still valid) where the employees themselves file a decertification petition with the Labor Board. However, this decision does not revisit long-standing precedents holding that an employer may not solicit its employees to withdraw their support from an incumbent union—the new procedures are an option when the employer complies with the law and has avoided unfair labor practices.

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