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CLIENT ALERT: NLRB Changes Rules Again – Duty to Bargain Prior to First Contract and Witness Statements

The NLRB has issued three new decisions that once again alter the labor law landscape, as the Board continues to reassess years of precedent and charts its own course on interpreting an employer's obligations under the National Labor Relations Act. The three cases involve 1) the question of what obligations an employer has to "bargain" with a new union on individual disciplinary actions when a first contract has not yet been negotiated; and 2) the union's right to witness statements taken by an employer during an investigation into employee misconduct.

I. Duty to Bargain with Union Over Disciplinary Actions Prior to First Contract

In ***Alan Ritchey Inc.*, 359 NLRB No. 40 (December 14, 2012**), the NLRB ruled that an employer must bargain with a union before imposing disciplinary discipline on a unit employee after the union has been certified but before a first contract has been negotiated. A Board panel of Chairman Pearce and Members Griffin and Block ruled that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and employers cannot impose certain types of discipline unilaterally.

The Board first explained that once a union is chosen as the representative of employees, an employer cannot continue to act unilaterally with respect to terms and conditions of employment, even where it had previously done so routinely or at regularly scheduled intervals. However, the Board notes that it

> …has never clearly and adequately explained whether (and to what extent) this established doctrine applies to the unilateral discipline of individual employees. We now conclude that it does, and that an employer must provide its employees' bargaining representatives notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees.

In the particular case before the Board, the employer imposed the discipline at issue for absenteeism, insubordination, threatening behavior and the failure to meet efficiency standards. Sanction ranged from formal warning to discharge and was imposed pursuant to a five step progressive disciplinary system. For the period in question, many employees were disciplined for one or more offenses with varying degrees of discipline. In all cases, company witnesses testified that some discretion was involved as to what discipline was imposed. The General Counsel for the Board argues that each act of discipline was a unilateral change because it did not represent an automatic execution of established policy (e.g. a standard wage increase on the anniversary of an employee's employment.)

In analyzing whether bargaining was required in each case, the Board first noted that, to be bargainable, a unilateral change must have a "material, substantial and significant impact on the

employees' terms and conditions of employment." Disciplinary actions such as suspension, demotion and discharge plainly have an inevitable and immediate impact on employees' tenure, status or earnings. Requiring bargaining *before* these sanctions are imposed is appropriate because of this impact on the employees and because of the harm caused to the union's effectiveness as the employees' representatives if bargaining is postponed. On the other hand, lesser forms of discipline – like oral and written warnings – have less impact on employees, and, held the Board, "bargaining over these lesser sanctions – which is required insofar as they have a 'material, substantial and significant impact' on terms and conditions of employment – may properly be deferred until after they are imposed." The Board summarized its basic conclusions as follows:

> Accordingly, where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the disciplinary system and bargain with the union over the discretionary aspects (if any), e.g. whether to impose discipline in individual cases, and, if so, the type of discipline to impose. The duty to bargain is trigged before the suspension, demotion, discharge or analogous sanction is imposed, but after the imposition for less sanctions, such as oral or written warnings.

While this seems clear in concept upon first reading, the Board's remaining explanations are anything but clear when trying to explain what the nature of that pre-imposition bargaining will look like:

> At this stage, the employer need *not* bargain to agreement or impasse, if it does so afterward. In exigent circumstances, as defined, the employer may act immediately, provided that, promptly thereafter, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects. Finally, if the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the union to agreement or impasse *after* imposing discipline.

In elaborating on what this means, the Board explained that this duty would involve "sufficient advance notice to the union to provide for "meaningful discussion concerning the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion."

> It will also entail providing the union with relevant information, if a timely request is made, under the Board's established approach to information requests….. The aim is to enable the union to effectively represent employees by providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties have not reached agreement, the duty to

bargain continues after the imposition of the discipline.

Moreover, the Board said there will be some "exigent circumstances" where the employer has "a reasonable, good faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel and in these cases, no pre-imposition bargaining need occur.

Finally, the Board said that the employer "need not await an *overall* impasse in bargaining before imposing discipline so long as it exercises its discretion within existing standards." After fulfilling its pre-imposition duties as described above, the employer may act, but must continue to bargain concerning its action, including the possibility of rescinding it, until reaching agreement or impasse. Among its other reasoning, the Board stated that bargaining over such decisions make sense because "to hold otherwise and permit employers to exercise unilateral discretion over discipline after employees select a representative … would render the union that purportedly represents the employees impotent."

II. Duty to Disclose Witness Statements to the Union

The Board issued two decisions clarifying the status of witness statements obtain during investigations into employee misconduct and a union's right to demand copies of them. First, in ***Stephens Media d/b/a Hawaii Tribune-Herald*, 359 NLRB No. 39 (December 14, 2012),** the Board ruled that a newspaper company that fired a union steward for alleged insubordination had an obligation to turn over to union representatives a witness statement by the steward's co-worker that described the confrontation they had had.

In 1978, the Board, in *Anheuser-Busch, Inc.,* 237 NLRB 982 (1978) had held that an employer did not have to turn over to the union "witness statements" obtained during investigations into allegations of misconduct. But it was not entirely clear what constituted a witness statement. The Board had followed up on *Anheuser-Busch* in the case of *New Jersey Bell,* 300 NLRB 42 (1990), where it found that an employer's investigative reports were not witness statements because: 1) the individual did not review the report, read them, or adopted them as a reflection of any statement she may have made and 2) the individual did not request, nor did she receive any assurances of confidentiality, as was the case in *Anheuser-Busch.*

In this case, the Board noted that the employee involved had indeed reviewed her statement- that had been written up by a company official – and signed it. However, she had not been given any assurances that the statement would remain confidential. As a result, the Board said the document was not a witness statement entitled to be kept from disclosure.

In addition, the Board found that the document was not protected from disclosure because it was a document prepared in anticipation of litigation. While the Board did agree that the work-product privilege applies to documents that are specifically created in anticipation of litigation, that privilege does not apply to documents produced in routine investigations.

> …the work-product privilege does not apply to documents produced pursuant to routine investigations conducted in the ordinary course of business, as it is limited to those documents specifically created in anticipation of foreseeable litigation.

In this case, management did meet with the witness "on advice of counsel" and the manager's handwritten note on the document states that it was "prepared at the advice of counsel in preparation for arbitration." However, that was insufficient to create a privilege. For one thing, the attorneys did not direct the manager to prepare a written statement. Second, the note inserted on the document regarding it being prepared at the advice of counsel" could have been written at any time prior to the hearing in this case and thus "does not evince the Respondent's motivation at the time the statement was prepared…. [the] note amounts to nothing more than a conclusory assertion of privilege that has little evidentiary value."

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While this case seemed significant when issued, it was dwarfed by the Board's subsequent decision in ***American Baptist Homes of the West d/b/a Piedmont Gardens,* 359 NLRB No. 46 (December 21, 2012**). In *Piedmont,* the Board officially overruled *Anheuser-Busch, Inc., supra* and stated that unions were not to be automatically denied access to witness statements obtained by the employer but instead the Board would utilize a "balancing test" in assessing union requests for the names and statements of witnessed interviewed during a company investigation.

In this case, a charge nurse (Berg) had seen a certified nursing assistant (Bariuad) sleeping while on duty. The HR director told the charge nurse to prepare a written statement and further told her that her statement would be confidential. Meanwhile, another charge nurse (Hutton) saw the same CNA sleeping, wrote up the incident and slipped it under the HR Director's door. She later clarified the statement at the request of the HR Director.

In investigating the case, the HR Director asked another CNA who was on duty with the employee under investigation to write up a statement as to how often she had seen him sleeping while on duty. She did so. After reviewing all the statements, the HR Director fired the employee. The union asked for "any and all statements that were used as part of your investigation." The request was denied, citing *Anheuser-Busch.*

The Board majority (Pearce, Griffin and Block) found that "the rationale of *Anheuser-Busch* is flawed." The Board majority noted that unions are entitled to "relevant information necessary to the union's proper performance of its duties… including information that the union needs to determine whether or not to take a grievance to arbitration." However, if an employer asserts that the relevant information is "confidential,' then the Board balances the union's need for the information against any legitimate and substantial confidentiality interests established by the employer. *Detroit Edison Co. v. NLRB,* 440 U.S.301 (1979).

In *Anheuser-Busch*, the Board then had decided that "witness statements are fundamentally different from the type of information contemplated in *Acme a*nd disclosure of witness statements involves

critical considerations that do not apply to requests for other types of information." The current Board, however, rejected this premise.

> We are not persuaded that there is some fundamental difference between witness statements and other types of information that justifies a blanket rule exempting such statements from disclosure.
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> We recognize that, in some cases, there will be legitimate and substantial confidentiality interests that warrant consideration, including the risk that employers or unions will intimate or harass those who have given statements, or that witnesses will be reluctant to give statements for fear of disclosure. But the same risks are presented by disclosure of witness names, for which there is no exemption, even where an employer asserts a good faith concern of confidentiality, threats, or coercion.
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> We find no basis to assume that all witness statements, no matter the circumstances, warrant exemption from disclosure. Rather we find it more appropriate to apply the same flexible approach that we apply in cases involving witness names. That test requires that if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party's need for the information. See *Detroit Edison,* 440 U.S. 301, 318-320 (1979); *Jacksonville Area Association for Retarded Children,* 316 NLRB 338, 340 (1995). The Board considers whether the information withheld is sensitive or confidential based on the specific facts of each case. *See Northern Indiana Public Service Co.,* 347 NLRB 210, 211 (2006). As stated above, the party asserting the confidentiality defense may not simply refuse to furnish the requested information but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Detroit Newspaper Agency,* 317 NLRB 1071, 1072 (1995).

Member Hayes (whose term ended in December) dissented from the opinion, finding no rationale for upsetting a 34 year precedent. He noted that withholding witness statements from unions would not and had not hindered a union's ability to investigate grievances or prepare for arbitration. Unions are free to obtain summaries of such statements without the statements themselves.

The bright rule of *Anheuser-Busch* has for over 30 years supported employer efforts to assure employee participation in the employer's investigatory process, protected participating witnesses from intimidation, retaliation or harassment by the union or coworker, enabled employers to effectively conduct investigations of workplace misconduct and facilitated the quick resolution of misconduct in private collectively bargaining grievance-arbitration systems.

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