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NLRB UPDATE: "Tilting the Playing Field"
The NLRB Issues Four Significant Decisions Favoring Unions and Employees

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The National Labor Relations Board continues to demonstrate its willingness to "tilt the playing field" in favor of unions and employees. In December 2012, the Board issued four significant pro-union/pro-employee decisions, including one which overturns 50 years of Board precedent.

WKYC -TV, Inc.: **Removing Dues Checkoff As An Employer Bargaining Weapon**

Since 1962, the Board has consistently held that an employer had the right to stop deducting union dues from employees' paychecks once the collective bargaining agreement requiring such "dues checkoff" had expired. This precedent has long provided employers with leverage in bargaining where negotiations continue beyond the expiration of the collective bargaining agreement.

On December 12, 2012, the Board overruled this long-standing precedent in a case involving WKYC-TV in Cleveland. In a 3-to-1 decision, the Board ruled that, from this point forward, an employer must continue to deduct union dues even after a contract expires until the parties either reach a new agreement or bargain to a lawful impasse.

In reaching this decision, the Board noted that an employer is generally not permitted to unilaterally change employees' wages, benefits and other terms and conditions of bargaining after a contract has expired and that there was, in the majority's view, no reason to treat dues checkoff in a different manner.

Board Member Brian Hayes, whose term ended at the end of December, pointed out the wisdom of the 50-year precedent treating dues checkoff differently in a cogent dissent. Dues checkoff provisions are similar to other contractually established terms and conditions of employment which have traditionally not survived contract expiration (i.e., arbitration provisions, no-strike clauses, and management-rights clauses). All of these provisions are "uniquely of a contractual nature" and "cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound." By contrast, wages and benefits exist as mandatory subjects of bargaining from the commencement of a bargaining relationship. Thus, contrary to the majority's view, dues checkoff is fundamentally different from employees' wages, benefits and other terms of employment which "pre-exist" the first collective bargaining agreement.

Failing to recognize this distinction will, as Member Hayes notes, effectively result in dues checkoff continuing indefinitely "unless the union agrees to end it (a highly unlikely possibility) or the parties reach lawful impasse on its elimination." And, of course, reaching impasse on the issue would require an employer to include elimination of dues checkoff in its final proposal to a union - which will likely lead to more, not less, labor strife.

The "unspoken object" of the majority's decision, as Member Hayes notes, is to force an employer "to act as the collection agent for dues to finance [the union's] opposition" to the employer's legitimate bargaining position. Thus, the *WKYC* decision takes another arrow out of the quiver of an employer's economic weapons in collective bargaining.

***Alan Ritchey, Inc.:* Requiring An Employer To Bargain Before Disciplining A Union Employee**

In *Alan Ritchey*, decided on December 14, 2012, the Board ruled that, in the absence of a binding agreement to arbitrate, an employer whose employees are represented by a union must bargain with the union *before* imposing discretionary discipline on a unit employee.

The Board has long held that an employer cannot act unilaterally with respect to terms and conditions of employment after employees have chosen to be represented by a union (for example, that an employer cannot unilaterally provide employees with a merit increase, even if it has traditionally done so, without first bargaining with the union over the amount and timing of the increase). However, these past decisions have not specifically addressed discretionary disciplinary decisions. In *Alan Ritchey*, the Board squarely addresses this issue and concludes that an employer also cannot make a discretionary decision to suspend or terminate an employee without first bargaining with the union.

It is important to note that the Board does place some important restrictions on the employer's duty to bargain over disciplinary decisions.

First and foremost, the duty to bargain only arises *in the absence of a binding agreement to arbitrate.* In *Alan Ritchey*, the employer's employees had just voted for union representation but the parties had not yet reached agreement on their first contract. Thus, there was no binding grievance/arbitration procedure at the time that the employer disciplined the employees. The other circumstance in which this duty to bargain will likely arise is during a strike or lockout after the expiration of a collective bargaining agreement (and where the parties have not otherwise agreed to abide by the expired grievance/arbitration procedure).

Second, the duty to bargain only arises with respect to decisions that have an immediate impact on an employee's earnings and/or work status (i.e., a suspension, demotion or discharge). It does not apply to warnings or other corrective actions.

Third, the duty to bargain only arises as to the discretionary aspects of the decision. Thus, if an employer has a written policy regarding absenteeism or work misconduct, it does not have an obligation to bargain over that policy. It is only obligated to bargain over whether the policy, as applied to the specific employee, warrants the suspension or discharge of the employee.

Fourth, where exigent circumstances are present (which the Board defines as the 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), the employer still has the ability to act unilaterally and impose discipline without providing notice to the union.

Finally, even when there are no exigent circumstances present, the Board does not require an employer to bargain to *impasse* before suspending or terminating an employee. Rather, the Board holds that an employer must simply provide the union with notice and an opportunity to bargain about the decision before proceeding to implement it. However, if the employer imposes discipline before reaching agreement or impasse with the union, the employer must then bargain with the union to agreement or impasse *after* imposing discipline.

Even though *Alan Ritchey* is not particularly broad in scope, it does grant the union additional power to impact an employer's ability to operate its business even though the parties have not yet agreed to a collective bargaining agreement.

Supply Technologies LLC: **Finding Another Mandatory Dispute Resolution Program Unlawful**

In *Supply Technologies*, decided on December 14, 2012, the Board continued its assault on mandatory dispute resolution programs for nonunion employees. In a 2-to-1 decision (with Member Hayes again dissenting), the Board concluded that Supply Technologies violated its employees' rights under the National Labor Relations Act (NLRA) by insisting that the employees agree to a mandatory dispute resolution program that provided for binding arbitration of any employment-related disputes.

This decision is significant because it demonstrates the hostility with which the Board views any dispute resolution program adopted by an employer. In this case, the opening paragraph of the agreement broadly stated that employees were required to bring any employment-related claims against the employer under the dispute resolution program. However, both the agreement and a separate Q & A document explaining the program expressly stated that employees retained the right to file a charge or complaint with a government agency.

Even though the right to file a charge with a governmental agency was expressly laid out in the agreement, the Board concluded that the written program violated the NLRA because the written agreement did not expressly identify the *National Labor Relations Act* or expressly state that employees had the right to file an unfair labor practice charge with the *National Labor Relations Board.* Thus, the Board concluded that "reasonable" employees reading the agreement would believe that they had no right to file an unfair labor practice charge.

Based upon this decision (and the earlier Board decision in *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012)), it is clear that any employer seeking to adopt a mandatory dispute resolution program for nonunion employees must ensure that the program expressly identifies and excludes employee rights under the NLRA. But even that may not be enough for the Board. As Member Hayes concludes in his dissent, "it is difficult to avoid the implication from this case that [the Board will conclude] that any private dispute resolution system for individual employees in a nonunion workforce is unlawful unless it is nonmandatory."

The Board's decision in *D.R. Horton* is currently on appeal in the Fifth Circuit Court of Appeals. However, even if the Appeals Court upholds an employer's right to require its employees to agree to arbitrate employment-related disputes, the Board is likely to continue to apply its decisions in *D.R. Horton* and *Supply Technologies* in other jurisdictions. The Board has a history of "respectfully disagreeing" with Court of Appeals decisions which conflict with its own precedent.

***Hispanics United*:**
Social Media Comments Constitute Protected, Concerted Activity

In *Hispanics United of Buffalo, Inc.,* the Board concluded that an employer unlawfully terminated five employees who posted comments on Facebook about a fellow employee. In this case, one employee stated (in a text message) that she was going to complain to her supervisor about the performance of her fellow employees. She never actually made a complaint. However, in response to her text message that she was going to make a complaint, five of her fellow employees posted comments on Facebook after work, expressing frustration about the first employee's criticism of their work. When the employer learned of the Facebook comments, the employer concluded that the comments constituted "bullying and harassment" against the first employee. Since the employer had a zero-tolerance policy prohibiting bullying and harassment, it terminated the five employees who had posted the Facebook comments.

The Board concluded that the Facebook comments made by the employees constituted concerted activity because the comments were made for the purpose of "mutual aid and protection" against the criticisms made by their fellow employee. Essentially, the Board found that the five employees were taking a first step toward taking group action to defend themselves against the accusations they reasonably believed that the first employee was going to make.

Hispanics United is important for two reasons. First, the decision makes clear that the Board considers comments made on Facebook and other social media to be indistinguishable from comments made at the workplace. Under the law, all statements (whether made face-to-face at work or via social media after work) will be treated the same by the Board. Second, the decision emphasizes the broad scope of what the Board considers to be protected, concerted activity within the meaning of the law. Even though the five employees did little more than complain about their fellow employee, that was enough to constitute "mutual aid and protection" that, at least in the Board's view, is entitled to protection under the NLRA.

If you have any questions, comments or concerns about this NLRB Update, please contact your Weston Hurd lawyer.

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