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Employment Law

NLRB Reinstitutes Employer's Obligation to Bargain Before Disciplining Employees

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Employers who are currently negotiating an initial collective bargaining agreement should be mindful that the National Labor Relations Board (NLRB) recently reaffirmed its analysis in Alan Ritchey, 359 NLRB 396 (2012), regarding an employer's obligation to bargain before disciplining individual employees when a union has been certified, but has not yet entered into a collective bargaining agreement with the employer.

On Aug. 26, in Total Security Management Illinois 1 & International Union Security Police Fire Professionals of America (SPFPA), 364 NLRB 106 (2016), the NLRB reiterated that an employer may not impose discretionary discipline when it is engaged in negotiations for an initial collective bargaining agreement with a recently certified union. Rather, the NLRB held, before imposing discipline on an employee within the bargaining unit, an employer must provide the union with notice and an opportunity to bargain unless the employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel. The NLRB's ruling in Total Security essentially revived the legal principles asserted in Alan Ritchey, which the U.S. Supreme Court invalidated on procedural grounds in 2014.

In Total Security, the employer, a provider of security planning and security services, discharged three of its security guards without providing their union any notice or opportunity to bargain. The union had been certified as the exclusive representative of a bargaining unit that included the three discharged guards. At the time of the discharges, the employer and the union had not reached an initial collective bargaining agreement. As a result of the discharges, the employer was charged with allegedly violating Section 8(a)(5) of National Labor Relations Act (NLRA), which makes it an unfair labor practice for an employer to refuse to bargain collectively.

The NLRB administrative law judge, relying on Alan Ritchey, found the employer's discharge of the guards to be unlawful. However, Alan Ritchey was subsequently invalidated by the Supreme Court in National Labor Relations Board v. Canning, 134 S.Ct. 2550 (2014), because the Ritchey board included two members whose appointments had been constitutionally infirm. Accordingly, the NLRB was tasked in Total Security with re-examining de novo whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees, when a union has been certified or lawfully recognized as the employees' representative but has not yet entered into a collective bargaining agreement with the employer.

The NLRB concluded that: the imposition of discipline on individual employees alters their terms or conditions of employment and implicates the duty to bargain if it is not controlled by preexisting, nondiscretionary employer policies or practices; discretionary changes to the terms or conditions of employment cannot be unilateral; and employers would not face an unreasonable burden if they needed to bargain before imposing discipline. Consequently, the NLRB held that unless an 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, an employer may not unilaterally impose discipline on bargaining unit employees when the union and the employer have yet to agree on a grievance process governing disciplinary disputes. Instead, the employer must provide the union with notice and an opportunity to bargain before imposing discipline on bargaining unit employees.

Fortunately for employers, recognizing the possible delay that a bargaining obligation might cause in implementing discipline, the NLRB minimized the burden on employers to the "greatest extent possible."

First, the NLRB held that the pre-imposition obligation attaches only with regard to the discretionary aspects of those disciplinary actions that have an inevitable and immediate impact on an employee's tenure, status, or earnings, such as suspension, demotion, or discharge. Accordingly, warnings, corrective actions, counseling, and the like do not require pre-imposition bargaining so long as they do not automatically result in more serious discipline.

Second, where the pre-imposition duty to bargain exists, the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed. This requires the employer to give sufficient advance notice to the union, and provide the union with relevant information, if a timely request is made. The employer is not required to bargain to agreement or impasse before imposing discipline, so long as it exercises its discretion within existing standards. If the parties do not reach agreement, the employer may impose the selected disciplinary action and then continue bargaining to agreement or impasse.

Furthermore, as mentioned above, the pre-imposition duty to bargain is not triggered where an 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. In this situation, an employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain.

Lastly, an employer has no duty to bargain over those aspects of its disciplinary decision that are controlled by nondiscretionary elements of existing policies and procedures. For example, the NLRB indicated that in a workplace where the employer has an established practice of disciplining employees for absenteeism, the decision to impose discipline for this conduct would not give rise to an obligation to bargain over whether absenteeism is generally an appropriate grounds for discipline. If the employer consistently suspended employees for absenteeism but the length of the suspension was discretionary, then bargaining would be limited to only the length of the suspension.

The NLRB applied its decision prospectively, because the uncertainty about the validity of Alan Ritchey, and dismissed the complaint against the employer. However, the NLRB noted that if its ruling was applied retroactively, the employer's failure to provide notice to the union and bargain over the discharges would have amounted to a violation of Section 8(a)(5) of the NLRA. Accordingly, employers must be aware that they risk violating the NLRA if they take disciplinary actions that alter the terms or conditions of an employee's employment (e.g. discharge) while initial negotiations with a recently certified union are ongoing. If disciplinary action is necessary, the employer must be cautious in providing the union with notice and an opportunity to bargain. •

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