Can I Get A Witness (Or At Least A Witness Statement)? NLRB Rules Witness Statements Are Now Fair Game

Insights
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For over 35 years, the National Labor Relations Board (NLRB) held that witness statements obtained by unionized employers during pre-arbitration investigations were exempt from disclosure to the union. However, on June 26, 2015, the NLRB reversed its own long-standing precedent and ruled that such witness statements must be provided to a union bargaining agent before an arbitration hearing. Employers no longer enjoy this blanket exemption and therefore should adjust their practices accordingly.

NLRB Reverses Course With New Ruling

In the case of *American Baptist Homes of the West dba Piedmont Gardens*, the majority of the current Board (Chairman Mark Gaston Pearce, Kent Y. Hirozawa, and Lauren McGerran) disagreed with the 1978 ruling in *Anheuser-Busch, Inc.*, which had providedthat witness statements should be subject to a blanket exemption from disclosure. Instead, the Board held that these statements should only be protected if the employer can demonstrate that there is a substantial interest in keeping them confidential. Indeed, the Board noted that the same balancing test that applies to all other information that employers claim to be confidential should also apply to witness statements.

Two Board members (Philip A. Miscimarra and Harry I. Johnson) dissented, arguing that the ruling in *Anheuser-Busch* protected the integrity of workplace investigations and should not be rejected by the Board. The dissent's biggest concern echoes those of many employers: by being required to disclose these witness statements, an employer's ability to properly investigate various workplace claims would be impeded.

Nevertheless, in its majority opinion, the Board acknowledged its departure from long-standing precedent and noted that the new standard would not apply retroactively to past cases where the employer has already refused to provide requested witness statements.

This is the NLRB's second effort to overrule *Anheuser-Busch.* A December 2012 decision against this same employer on the same grounds was set aside in 2014 following the U.S. Supreme Court's *Noel Canning* ruling. In that case, the SCOTUS held that President Obama's January 2012 recess appointments were unconstitutional, invalidating many NLRB decisions involving Board members who were ruled to have been impermissibly appointed. Once the administration complied with the Court's appointment standards, the issue was resolved and the path was cleared for this 2015 decision

decision.

What Should Employers Do?

Given the Board's new ruling, our advice is for employers to seek counsel at the earliest possible opportunity to help conduct or assist with workplace investigations. Furthermore, when conducting these investigations, you must now give consideration as towhen you should take an employee's statement during an investigation, as opposed to simply taking investigative notes without regard to potential consequences. Finally, be mindful to refrain from assuring employees that their statements will remain confidential, as there is a good chance they may need to be produced to the union.

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