Disclosure Danger: Employers Still Stuck With NLRB's Witness Statement Disclosure Standard

Insights
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The U.S. Court of Appeals for the District of Columbia rejected the chance yesterday to revive long-held precedent which for many years had protected employer witness statements from disclosure to unions before an arbitration hearing. The court instead ruled that the employer in the center of the battle did not have standing to challenge the National Labor Relations Board's (NLRB's) far-reaching 2015 decision in *American Baptist Homes of the West dba Piedmont Gardens*, snuffing out the current litigation and ending employer hopes of an ultimate victory. Although it did not affirmatively adopt the NLRB's standard, the court's ruling essentially leaves intact a new standard whereby witness statements might have to be turned over to unions before the witness testifies.

The June 6 ruling is a disappointing one for unionized employers. It leaves in place a troubling decision that changes the way employers conduct workplace investigations in a union environment and places management representatives in a tricky situation. While it is possible that a reformed Labor Board installed by the Trump administration will one day reverse the current standard and resurrect the decades-old precedent which had protected witness statements from disclosure, it is not possible at this time to predict whether and when such a day might arrive. In the meantime, there are some specific steps we recommend each employer take in order to comply with this standard, as outlined at the conclusion of this article (*American Baptist Homes of the West v. NLRB*).

Background: The Tradition Protecting Employer-Obtained Witness Statements
Since 1978, the National Labor Relations Board (NLRB) had treated witness statements as exempt from an employer's general duty to furnish information to unions before arbitration. The NLRB first articulated this rule in the 1978 *Anheuser-Busch, Inc.* case, where the Board held that the general duty to furnish information "does not encompass the duty to furnish witness statements themselves."

After *Anheuser-Busch*, the Board generally required an employer to provide summaries of witness statements, but under that precedent the employer had no obligation to provide the actual witness statements to the union. This standard helped protect the integrity of employer investigations and to protect witnesses from intimidation or retaliation, particularly protecting the employees who provided incriminating information against fellow bargaining unit members. But in 2015, the NLRB set this standard in its sights with an eye towards liberalizing disclosure requirements.

Sleeping On The Job: History Of The *American Baptist Homes* Case

In the *American Baptist Homes* case, the employer was advised that a unionized employee might have been sleeping on the job, as witnessed by fellow employees who also belonged to the union. The employer requested that two witnesses voluntarily provide a statement outlining their observations, and assured them that their statements would remain confidential. Another employee voluntarily provided a separate witness statement after learning her coworkers had been promised complete confidentiality.

After completing its investigation, the employer terminated the sleeping employee, and the union grieved and requested the three witnesses' names, job titles, and copies of the statements. Citing *Anheuser-Busch*, the employer refused to provide any of the information. The union filed an unfair labor practice charge based on the refusal to provide the requested information, and an administrative law judge ruled that the employer was privileged under *Anheuser-Busch* to withhold the witness statements.

On June 26, 2015, the NLRB overruled *Anheuser-Busch, Inc.*, holding that the confidentiality of witness statements should be analyzed in future cases by balancing the union's need for the requested information against any "legitimate and substantial confidentiality interests established by the employer." This is the standard applied in all other cases involving assertions that requested information is confidential, as articulated in 1979 by the Supreme Court in the *Detroit Edison Co. v. NLRB* case. The Board went on to analyze the witness statements in the current case under the *Anheuser-Bush* test, finding that the witness statement that was given voluntary was, in fact, not a witness statement within the meaning of *Anheuser-Busch*. It found that the statement was not provided under an assurance of confidentiality and the witness gave the statement because she felt it was one of her job duties to do so.

Importantly, the Board decision did not prohibit employers from withholding witness statements. However, no longer could the employer automatically do so, instead having to articulate a legitimate reason as to why it was necessary to withhold confidential information. The Board did not identify any specific factors which would tend to justify nondisclosure, although it did allude to the original concerns underlying the *Anheuser-Busch* rule – fear of reprisal and intimidation – as possible justifications.

The D.C. Circuit Declines To Scrap The Board's New Test

The D.C. Circuit ruled in yesterday's decision that the NLRB's application of *Detroit Edison's* standard for keeping witness statements in investigations confidential was lawful, agreeing that employers must justify the act of withholding witness information from the union once the arbitration process has commenced. Writing for the three-judge panel, Chief Judge Merrick Garland wrote that the court did not view the Board's decision as arbitrary or erroneous in applying the established law to facts, and quickly deferred to the Board's judgment on the necessity to overrule its own case law. The court instead turned most of its focus addressing American Baptist's concerns that it would be subject to unfair labor practice and contempt proceedings if it did not comply with the new rule for this specific case.

The court determined that for the specific case in front of it, the Board could not hold American Baptist in contempt for following the Board's order. For that reason, the court held that American Baptist did not have legal standing to challenge the NLRB's actions. However, for future cases, American Baptist – and all other employers – would be subjected to the *Detroit Edison* analysis when it comes to assessing whether witness statements would need to be produced to the union.

What This Means For Employers

If you have not done so, it is time to adjust to this new reality. You should be prepared with a "substantial" justification when withholding witness statements from the union. Unfortunately, because the D.C. Circuit did not affirmatively rule on the merits of the standard, there is no clear direction as to what a "substantial" justification will entail. You should consider adopting the following approaches to combat any challenges to the confidentiality of witness statements:

- Maintain a confidentiality policy that covers witness statements;
- During witness interviews, solicit from witnesses whether they have any fears that writing a statement might subject them to threats or any risk of retaliation. Ask for specific details and prepare a written memo of the specifics to support the company's decision to keep the statement confidential;
- Promise employees only that statements will be kept confidential to the extent legally possible;
- Stamp any investigative witness statements as "Confidential;"
- Limit access to the documents to those individuals who have a need to know what is in them; and
- Where there is a legal obligation to investigate a particular situation (for example where harassment is alleged), consider seeking legal counsel to aid the investigation process.

For more information, contact the authors at MRicciardi@fisherphillips.com or DGarcia@fisherphillips.com, any member of our Labor Relations Practice Group, or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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