

NLRB Says Employers Must Bargain Over Discretionary Discipline Decisions With Newly Elected Unions

December 26, 2012

In *Alan Ritchey, Inc.*, 359 NLRB No. 40 (decided December 14, 2012) the National Labor Relations Board (the Board) created more new law. It held that an employer has a duty to bargain with a newly elected union before unilaterally disciplining individual employees even though the employer does not alter....

In *Alan Ritchey, Inc.*, 359 NLRB No. 40 (decided December 14, 2012) the [National Labor Relations Board](#) (the Board) created more new law. It held that an employer has a duty to bargain with a newly elected union before unilaterally disciplining individual employees even though the employer does not alter broad preexisting standards of conduct but merely exercises discretion over whether and how to discipline individuals. This duty exists even though the parties have not agreed to a first contract. The new rule will be applied prospectively.

The issue arose under the following circumstances. The employer provided contract services to the U.S. Postal Service. A unit of employees at the employer's Richmond, California facility voted for union representation on April 13, 2000. Prior to this time, the employer maintained efficiency and absenteeism standards. It also had handbook rules prohibiting insubordination and threatening conduct. The employer continued to apply these standards after the employees chose union representation. The employer admitted that it exercised discretion when imposing discipline under these rules. The union contended that the employer could not impose discretionary discipline on employees unilaterally without first bargaining over these decisions with the union even though the parties had not finalized a first collective bargaining agreement. After an almost thirteen-year odyssey through Board and court procedures, the Board agreed with the union.

Stated simply, the Board observed that discipline is a mandatory subject of bargaining. As such, and analogizing discipline systems to discretionary wage increase practices, the Board said that employers may neither change the basic rules of the system nor implement them in a discretionary manner without bargaining with a newly elected union first. This is true even where the parties have not agreed to the terms

of a first contract. The Board then embarked upon a discussion that contained a labyrinth of explanations, justifications, and qualifications too complicated (or convoluted) to detail here.

The practical effects of the Board's ruling are as follows. Once employees elect a union, and even before a contract is reached, the following rules apply:

- Employers may not unilaterally change disciplinary rules, policies, and practices.
- Employers may not apply existing disciplinary rules, policies, and practices to individual employees in a discretionary manner without first bargaining with the union in some but not all cases.
- Generally, employers must bargain with a union about discretionary discipline decisions that have a material, substantial, and significant impact on an employee's terms and conditions of employment prior to implementation of the decision.
- Suspensions, discharges, and demotions are the kind of decisions that require bargaining before they are implemented.
- Lesser forms of discipline, such as oral and written warnings, require bargaining after (not before) they are implemented when they have a material, substantial, and significant impact on an employee's terms and conditions of employment.
- The duty to bargain over pre-implementation discipline decisions does not require the parties to bargain to agreement or impasse at this stage if they do so after the decision is implemented.
- The duty to bargain over pre-implementation discipline decisions requires the employer to provide sufficient advance notice to the union to allow for meaningful discussion concerning the grounds for discipline in a particular case, the grounds for imposing the discipline, and the grounds for the form of discipline chosen to the extent that this choice involved an exercise of discretion.
- The duty to bargain also requires timely compliance with union information requests.
- The employer does not have a duty to bargain over "those aspects of its disciplinary decision that are consistent with past practice or policy."
- An employer may act unilaterally and impose discipline without first providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances.
- Exigent circumstances can include cases 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. While these circumstances will be defined on a case by case basis, the Board concedes that they can exist where the employee has engaged in unlawful conduct, poses a significant risk of exposing the employer to legal liability for his or her conduct, or threatens safety, health, or security in or outside the workplace.
- An employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union an interim grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration.

It is easy to conclude from this laundry list of new obligations and their exceptions that employers are going to have a very difficult time determining what is and what is not permitted under the Board's decision. This is

particularly true in light of the fact that satisfying the rules and the duties they create will require subjective determinations by the employer that in turn will be highly susceptible to second guessing by both unions and the Board. For example, which lesser forms of discipline have a significant enough impact on the employee's terms and conditions of employment to require bargaining? How long must an employer wait to allow the union to digest voluminous data received from a broad information request before the Board will conclude that the union has been given a sufficient opportunity for a "meaningful discussion" of the discipline decision at issue? Who will be responsible for back pay if the union waits day or weeks to have a meaningful discussion about an employee who has been suspended without pay?

All of this uncertainty and confusion will lead inevitably to more litigation. Those affected can only hope that it will not take another 13 years to get answers to the questions that the Board has created by its decision.

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