NLRB Finishes 2012 by Issuing Numerous Notable Decisions for Union and Non-Union Employers

In the last month, the National Labor Relations Board ("NLRB" or "Board") issued a number of significant decisions touching on a broad range of labor law issues including, among others, social media postings, backpay awards, requests for information, the chargeability of certain union lobbying expenses, and an employer's responsibility to continue dues collection after the expiration of a collective bargaining agreement. The most significant of these decisions are summarized below. These decisions—a number of which reverse long established Board precedent—clearly demonstrate a very activist agenda that is decidedly favorable to union interests and views.

In Unionized Workplaces that do not have a Contractual Grievance/ Arbitration Procedure in Place, Employers Must Nevertheless Bargain with Unions Before Implementing Discipline: *Alan Ritchey, Inc.*

The NLRB held that employers must give notice and offer to bargain before enforcing discretionary discipline on its union represented employees, but the Board declined to apply the new rule retroactively. *Alan Ritchey*, *Inc.*, 359 N.L.R.B. No. 40 (2012).

A group of former and current employees of Alan Ritchey challenged disciplinary measures ranging from warnings to terminations, arguing that these measures were not uniformly applied to all employees. The Board concluded that Alan Ritchey should have offered bargaining rights to the union. Noting that it had not previously commented on prediscipline bargaining standards, the Board held that unions have to be informed of changes in workplace policy, rules, discretionary employee suspensions, demotions, and terminations that are made on a case-by-case basis before they are implemented. The new rule does not apply, however, to written or oral warnings for misbehavior. In so holding, the Board reasoned that "the lesson of well-established board precedent is that the employer has the duty to maintain an existing policy governing terms and conditions of employment and a duty to bargain over discretionary applications of that policy." The Board also dismissed concerns that the new rule would create an excessive burden or delay on employer actions, and emphasized that unions only have an opportunity rather than a requirement to bargain.

Note: This decision is of significant importance to newly unionized employers bargaining a first contract. Under *Alan Ritchey*, *Inc.*, if a unionized workplace is without a collectively bargained grievance and arbitration system, an employer may not unilaterally exercise discretion in imposing significant discipline. Instead, the employer would need to provide the union with notice and an opportunity to bargain before imposing such discipline on an employee.

NRLB Orders Disclosure of Witness Statement Obtained by Employer Without Confidentiality Promise: *Hawaii Tribune Herald*

The NLRB ruled that employers must disclose witness statements obtained without a confidentiality promise. *Hawaii Tribune Herald*, 359 N.L.R.B. No. 39 (2012).

The Board held that the newspaper company that fired an employee for alleged insubordination violated its duty to bargain with the union by refusing to release witness statements obtained without confidentiality promises. In so holding, the Board addressed the issue of what constitutes a "witness statement" exempt from the employer's general duty to furnish relevant information to an incumbent union. While noting that *Anhesuer-Busch, Inc.*, 237 N.L.R.B. 982 (1978), held that the duty to furnish information "does not encompass the duty to furnish witness statements themselves," the Board emphasized that *Anheuser-Busch* did not clearly define what constituted "witness statements." The Board looked to existing precedent, finding that employee statements are not exempt from disclosure where there is no showing that the employee had adopted the statement or received an assurance of confidentiality before signing the statement. Although the witness in this case reviewed and signed the statement, the Board held that the document was not exempted from disclosure because the newspaper obtained the statement from the employee without promising to keep it confidential. The Board also rejected the newspaper's argument that the statement is privileged attorney work product, finding that the newspaper failed to establish that the document was created in anticipation of foreseeable litigation.

Note: Pursuant to *Hawaii Tribune Herald,* to protect witness statements from disclosure, employers should make assurances that the statement will remain confidential and ensure that the witness reviews and signs the statement.

Mandatory Dispute Resolution Program Unlawful: *Supply Technologies, LLC.*

The NLRB recently ruled that a mandatory dispute resolution program maintained by an employer violated the National Labor Relations Act because employees could reasonably interpret the program as blocking them from filing charges with the Board. *Supply Technologies, LLC.*, 359 N.L.R.B. No. 38 (2012).

The employer, Supply Technologies, instituted a grievance-arbitration program and subsequently fired 20 employees who refused to sign an agreement to be bound to the program. Although the agreement did not explicitly restrict workers' rights under the NLRA, the Board found that it could reasonably be construed as prohibiting the employees from filing claims with the NLRB because the agreement required workers to use the program to bring "any claim of any kind." The Board noted that the agreement was "densely packed with legalese" and was designed to be broad. The Board also found that ambiguity in the agreement was exacerbated by other documents given to the employees in conjunction with the agreement. The employer argued that the agreement protected the right to file NLRB charges, pointing to language in the agreement stating that employees could still file charges or complaints with government agencies. The Board disagreed, holding that the language does not name any statute or agency, or explain that an administrative charge is an exemption to the broad and nonexhaustive list of claims that the agreement mandated be brought through the program.

Note: Following *Supply Technologies,* employers should consult with counsel to review mandatory dispute resolution programs and policies to ensure they provide express and specific language regarding NLRA claims exemptions.

NLRB Solidifies Stance on Social Media Comments as Protected, Concerted Activity: *Hispanics United of Buffalo*

In the Board's second decision concerning terminations over Facebook posts, the NLRB found that an employer unlawfully terminated five employees because of their Facebook posts and comments about a co-worker. *Hispanics United of Buffalo*, 359 N.L.R.B. No. 37 (2012).

In the Board's first lengthy discussion analyzing the issue of "protected, concerted activity" in the context of social media, the Board utilized the analytical framework established in *Meyers Industries*, 268 N.L.R.B. 493 (1983) and its progeny, in holding that an adverse employment decision is unlawful if it is motivated by an employee's protected, concerted activity and the employer knows the activity was concerted. In this case, an employee voiced her intention to take her criticisms of her fellow co-workers' job performance to management. The other employees, all off-duty and using personal computers, responded to the criticisms on Facebook. The next day, the employees involved in the Facebook exchange were terminated for violating the employer's zero-tolerance bullying and harassment policy. The Board held that the online exchange was protected, concerted activity because it was the workers' first step toward group action to defend against the accusations they believed would be made to management. In so holding, the Board noted that even if the exchange was construed as harassment and bullying under the employee's policy, a workplace policy cannot be enforced if it discourages protected activity.

Note: *Hispanics United of Buffalo* reinforces the Board's position that employees' speech through social media may be entitled to protection under the NLRA and illustrates the analytical framework the Board will use to analyze concerted activity claims arising out of social media communications.

Employers Must Promptly Respond to All Union Requests for Information, Even if Information Sought is Irrelevant: *IronTiger Logistics, Inc.*

The NLRB held that employers must respond promptly to union requests for information, even when the information requested may be irrelevant to the union's representation of employees. *IronTiger Logistics, Inc.*, 359 N.L.R.B. No. 13 (2012).

The Board held that although the employer was correct that the information requested was ultimately irrelevant and did not ultimately need to be provided, the employer committed an unfair labor practice because of its delayed response to the union. Although the NLRA requires that unionized employers provide unions with requested information that is relevant and necessary to the unions' performance of its duties as the employees' collective-bargaining representative, the Board concluded that employers have a duty to respond in some form to all requests for "presumptively relevant" information.

Note: While *IronTiger Logistics, Inc.*, does not require employers to ultimately provide information in response to every request, it does hold that employers must respond in a timely manner even if the response is merely the employer's basis for the denial of information.

NLRB Reverses Longstanding Practice and Rules that a "Dues-Checkoff" Provision Survives Expiration of a Collective Bargaining Agreement: *WKYC-TV, Inc.*

The NLRB overruled 50 years of labor law precedent, ruling that a collective bargaining provision authorizing an employer to deduct union dues from an employee's paycheck ("dues-checkoff") continues in force after the collective bargaining agreement expires. *WKYC-TV, Inc.*, 359 N.L.R.B. No. 30 (2012). In so holding, the Board abandoned its well-established rule from *Bethlehem Steel*, 136 N.L.R.B. 1500 (1962) and its progeny, which held that a dues-checkoff provision expires with the expiration of the collective bargaining agreement containing it.

In deciding the case, the NLRB held that the longstanding rule from *Bethlehem Steel* was unjustified, and further found that requiring employers to continue honoring dues-checkoff provisions after a contract expires is consistent with the language and history of the NLRA. The Board first explained that a dues-checkoff provision is a mandatory bargaining subject, which generally cannot be unilaterally changed without bargaining in good faith until the parties reach impasse. Most mandatory bargaining terms also remain in force according to the labor contract's terms, even after the contract expires. Because of this, employers cannot unilaterally modify these terms without violating the NLRA. While the Board acknowledged that some mandatory bargaining terms do not survive a contract's expiration, the Board reasoned that these provisions are unique because they involve voluntary waivers of rights guaranteed by the NLRA. By contrast, the Board found that dues-checkoff provisions do not function as waivers, but rather as an administrative convenience. The Board analogized dues-checkoff to employer withholdings for employee savings accounts and charitable contributions, which do survive expiration of the contracts authorizing them.

The Board further reasoned that nothing in federal labor law or policy is inconsistent with holding that dues-checkoff survives a contract's expiration. In particular, the Board found that although the Taft-Hartley Act prohibits employers from giving anything of value to a labor union, the Act allows for dues-checkoff provisions. The Board suggested that the Taft-Hartley Act contemplates dues-checkoff provisions surviving a labor contract's expiration. As evidence of this, the Board observed that the same section of Taft-Hartley also allows for employers to transfer trust fund payments to unions when such transfers were authorized "in a written agreement with the employer." The NLRB has ruled these trust fund provisions survive a contract's expiration. Moreover, the Board claimed that its historical precedent on the issue was fundamentally flawed. In *Bethlehem Steel*, the Board held that because a union-security provision cannot survive a contract's expiration (and a dues-checkoff implements a union security provision), dues-checkoff also cannot survive the contract's expiration. However, the current Board found that union-security and dues checkoff provisions were independent, as evidenced by so-called "right-to-work" laws, which prohibit union-security clauses but allow dues-checkoff provisions. The Board further noted that while a union-security clause imposes a mandatory obligation (i.e., membership), a dues-checkoff clause requires a voluntary action in that it must be authorized by the individual employee.

Note: The *WKYC-TV, Inc.* decision will clearly affect parties' respective economic language in contract negotiations, given employers' historical use of discontinuing dues deduction after a labor contract expires to pressure a union during a labor dispute. A further challenge to the Board's new rule before the U.S. Circuit Court of Appeals seems likely.

NLRB Adopts Changes to Remedial Orders, Requiring Employers to Cover Extra Taxes on Backpay Awards and to File Reports to Social Security Administration Allocating Backpay Awards to the Respective Calendar Quarters: *Latino Express*

The NLRB adopted changes to backpay orders it issues in unfair labor practice cases, requiring employers to file a report to the Social Security Administration ("SSA") allocating backpay awards

to the appropriate calendar quarters and also requiring employers to compensate employees for the adverse tax consequences of receiving lump sum backpay awards. *Latino Express*, 359 N.L.R.B. 44 (2012).

The NLRB first addressed the effects of unfair labor practices on employees' Social Security benefits. The Board noted that although backpay awards are computed on a quarterly basis, backpay awards may be made on a lump sum basis which covers multiple years. It further noted that backpay awards are posted to the employee's Social Security earnings record in the year in which it is received, unless the employer or employee files with the SSA a separate report allocating backpay to the years in which the pay was or would have been earned. The Board found that failing to credit backpay to the quarters covered by the backpay award may disadvantage an employee by potentially depriving the employee of Social Security credits. The Board thus concluded that it "shall now routinely require the filing of a report with the SSA allocating backpay awards to the appropriate calendar quarters."

The Board also concluded that it was necessary to address the tax consequences of a backpay award to an employee. Because the IRS considers a backpay award to be income earned in the year the award is paid, regardless of when it should have been received, the Board found that an employee who receives a lump sum back pay award covering more than a single calendar year may fall into a higher tax bracket and face more income tax liability than if the unfair labor practice had not occurred. Thus, the Board concluded that it "shall henceforth routinely require respondents to compensate employee for the adverse tax consequences of receiving one or more lump-sum backpay awards covering period longer than 1 year."

Note: Both new changes will be applied retroactively and thus, will be included in remedial orders issued in currently pending cases. The *Latino Express* decision increases the administrative burden on employers in requiring them to file separate reports to the SSA, and will increase the amount of backpay owed by requiring employers to compensate employees for any extra taxes they have paid in receiving the backpay in a lump sum.

Unions Not Required to Provide Nonmember Objectors With Audit Verification Letters and Lobbying Expenses Can be Chargeable to Nonmember Objectors: *United Nurses and Allied Professionals*

The NLRB recently held that private sector unions are not required to provide nonmember objectors with audit verification letters and that lobbying expenses may be chargeable to nonmember objectors. *United Nurses and Allied Professionals*, 359 N.L.R.B. No. 42 (2012). The NLRB addressed several novel issues arising from the Supreme Court's decision in *Communication Workers v. Beck*, 487 U.S. 735 (1988), which held that the NLRA does not privilege a collective-bargaining representative, over the objection of nonmember employees it represents, to expend funds collected from those employees under a union-security agreement on activities unrelated to collective bargaining, contract administration, and grievance adjustment.

The Board first held that the union did not violate the NLRA by failing to provide a nonmember objector with an audit verification letter. In so holding, the Board distinguished case law holding that public-sector unions were required to provide objectors with an independent verification that an audit had been performed. The Board declined to incorporate such a requirement into law, reasoning that the public-sector unions' conduct is evaluated under a heightened First Amendment standard, whereas private-sector conduct is properly analyzed under the duty of fair representation, breached only by conduct that is arbitrary, discriminatory, or in bad faith. The Board held that the duty of fair representation does not impose a per se obligation on unions to provide objectors with an audit verification letter. Here, the Board found the union was reasonable in providing objectors with its major categories of expenditures, along with an assurance that the figures were independently verified.

The Board also held that like all other union expenses, lobbying expenses are chargeable to objectors to the extent that they are germane to collective bargaining, contract administration, or grievance adjustment. The Board rejected the view that lobbying expenses incurred by unions were per se nonchargeable. The Board further held that germane lobbying activities are chargeable to objectors even if they are extra-unit, provided that they are incurred for services that are otherwise chargeable, and that may ultimately inure to the benefit of employees in the objector's bargaining unit because of the union's participation in an expense-pooling arrangement with other locals. The dissenting opinion criticized the majority opinion's "overly broad test for determining the chargeability of lobbying expenses."

NLRB Extends Doctrine of "Inherently Concerted Activity" to Protect Job Security Conversations: *Sabo, Inc. d/b/a Hoodview Vending Co.*

The NLRB extended the doctrine of "inherently concerted" activity, finding that conversations about job security are protected regardless of whether the conversation contemplated future group activity. *Sabo, Inc. d/b/a Hoodview Vending Co.,* 359 N.L.R.B. No. 36 (2012).

In determining whether a conversation between two employees, discussing whether an internet job posting meant that the employer was going to terminate one of its employees, was protected concerted activity, the Board noted that a conversation is generally protected when it contemplates group action. The Board held,

however, that the contemplation of group action is not required where the conversation is "inherently concerted." The Board had previously found wage discussions inherently concerted. The Board concluded that job security discussions were also inherently concerted. The Board reasoned that job security, like wages, is a vital term and condition of employment. Thus, job security discussions are protected, regardless of whether the conversations contemplate group activity. The dissent argued that the Board should not have extended the inherently concerted doctrine to discussions of job security, and also called for an abolition of the doctrine in its entirety.

Note: Employers should be aware that the Board may increasingly use the doctrine of inherently concerted activity to bring employee conversations within the protections of the NLRA.

The NLRB's activist agenda has been coupled with its public outreach campaign. NLRB Chairman Pearce has recently defended the Board's outreach to the U.S. population through technology, education, and other actions in an effort to raise the Board's profile among workers. Chairman Pearce also defended the Board's greater use of press releases, creation of a website, speakers, and other forms of publicity. He stated "The NLRB has an institutional habit of staying away from the microphone. We're changing that. We're moving toward the microphone." See "Lead Report" in *Construction Labor Report*, vol 58, No. 2890, p. 1063 (Nov. 1, 2012).

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