

NLRB OVERTURNS 37-YEAR PRECEDENT REGARDING DUTY TO PROVIDE WITNESS STATEMENTS TO UNIONS

Labor & Employment Alert
July 15, 2015

On June 26, 2015, the National Labor Relations Board (NLRB) reversed its 37-year precedent, ruling in *American Baptist Homes of the West, d/b/a Piedmont Gardens*, that employers must disclose to unions confidential witness statements gathered during workplace investigations, unless “legitimate and substantial confidentiality interests” outweigh a union’s need for the information. Thus, going forward, the NLRB will apply a balancing test to determine whether an employer properly refused to provide witness statements to unions. The test will apply to all cases where the employer’s refusal to provide requested witness statements occurred after June 26, 2015.

By way of background, the National Labor Relations Act requires employers to provide union representatives with information relevant to the union’s collective bargaining duties. This duty includes the obligation to provide information regarding the processing of grievances. However, in 1978, in *Anheuser-Busch Inc.*, the NLRB held that the employer’s duty to provide information to a union does not encompass a duty to furnish witness statements themselves, as those are “fundamentally different.”

In 2012, the NLRB decided *Piedmont Gardens*, overruling *Anheuser-Busch*’s standard regarding provision of witness statements. The decision was effectively voided, however, by the Supreme Court’s *Noel Canning* decision. The current, properly constituted NLRB revisited *Piedmont Gardens* and – once again – reversed *Anheuser-Busch*.

Under the new standard, as mentioned above, an employer will have to establish “legitimate and substantial confidentiality interests” before refusing to provide requested witness statements to a union. The NLRB cautioned that this standard will not be met by showing a generalized desire to protect the integrity of employment investigations. Rather, an employer will have to establish that there is a need for witness protection, danger of evidence being destroyed, testimony being fabricated, or facts being covered up before the employer will be allowed to withhold witness statements. The NLRB held that an employer will have to “seek an accommodation that would allow the requester to obtain information it needs while protecting the party’s interest in confidentiality.”

Attorneys

Joseph Braccio
Ryan Everhart
Andrew Freedman
Peter Godfrey
John Godwin
Karl Kristoff
Elizabeth McPhail
Jacqueline Meyer
Jeffrey Swiatek

Practices & Industries

Labor & Employment

NLRB OVERTURNS 37-YEAR PRECEDENT REGARDING DUTY TO PROVIDE WITNESS STATEMENTS TO UNIONS

Employers who conduct workplace investigations should take note of this decision, recognizing that, subject to certain restrictions, they will be required to disclose witness statements to unions upon demand. Accordingly, before declining to provide a requested statement, employers should seek advice of counsel to ensure the requisite legal grounds exist for such refusal.

