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Union Not Entitled to Information About How Employer Spends Money From Tax Cut, NLRB General Counsel Rules

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In prior posts, we have discussed how information requests made in the context of a bargaining relationship can be vexing. The standard of the employer's obligation to provide information can be a moving target, depending on the make-up of the NLRB. For example, for a brief period of time we saw how an employer could be found to have to have breached its duty to bargaining by merely failing to respond to a union's information request, even though there was no duty to provide information.

The use of information requests can at certain times be used as a weapon. Recently, in Nexstar Media Group., Inc., Case No. 03-CA-220094, Adv. Mem. (October 15, 2018), a union's request for information about the employer's use of money it saved due to the recent corporate tax cuts became the subject of NLRB litigation.

Background – Employer Offers Bonus to Non-Union Employees Crediting Tax Savings

In late 2017, Congress passed the Tax Cuts and Jobs Act ("TCJA"), which among other things, reduced the corporate tax rate. In January 2018, the employer informed its unrepresented employees that "the new corporate tax rate will produce a financial benefit ...and the Company wants to extend that benefit to our employees via a one-time bonus and an increase to the 401k match." The employer's announcement stated that it was not granting the bonus and increased benefit match to union-represented employees whose contracts were under negotiation.

Union Makes Broad Information Request

During the course of bargaining, the union made a written information request to the employer. The request stated the purpose was to prepare for bargaining and "to ensure the tax cut raises wages and stops the offshoring of jobs". The request had ten separate paragraphs which sought a wide variety of information, including:

- the estimated gains to the corporation and its subsidiaries and affiliates from the TCJA
- the total compensation for executives for the year before and the current year after passage of the TCJA
- The amount spent by the employer on lobbying or public relations campaigns in support of the TCJA
- an accounting of the total amount of profits held overseas, the amount to be repatriated, and the total tax to be paid on that repatriation over each of the next five years

The employer refused to provide the information and the union filed charges.

Advice Recommends Dismissal

The charge was sent to the NLRB's Division of Advice, likely because there are dozens of charges on file dealing with similar requests for information (and similar employer refusals) and the General Counsel wanted to act in a consistent manner.

Before getting to the merits of the issue, Advice set forth the general standard of law that when the requested information "concerns bargaining unit employees or their terms and conditions of employment" then it is generally considered to be relevant to bargaining and must be produced "unless the employer rebuts the presumption."

In its request, the union stated there were two purposes in needed the information in order to conduct bargaining. The first was to ensure, through bargaining ,that the employer's TCJA benefit went to increasing pay of the employees and to returning jobs to the United States. The second purpose was to aid the union in its bargaining about bonuses and 401k contributions. Advice concluded that "[n]either articulated purpose entitles the Union to the information it requested."

Advice noted, the first purpose "created no duty because that purpose goes beyond the Union's statutory role." In other words, there was not a direct relationship between the federal tax act and the employees' terms and conditions of employment. In this regard, Advice noted "the Union has failed to identify any provision in the TCJA obligating the Employer to spend its tax savings toward the Union's preferred objectives or granting the Union a role in enforcing such a requirement." Without some direct link to, obligation created by, the tax cut law, Advice noted that how an employer chose to spend any savings it garnered from the tax cut was akin to an entrepreneurial decision which is not a mandatory subject of bargaining.

As to the second purpose, Advice stated that the union failed to show how the information was "reasonably necessary" to engage in meaningful bargaining over bonuses and 401k matches. The union had contended in support of its charge that the employer made the information about the size of the tax benefit relevant because it announced that was granting benefits as a result of the TCJA. Advice brushed this claim aside, stating "the Union has failed to explain how the Employer's announcement rendered the requested information reasonably necessary to frame or support any Union bargaining proposals."

Takeaways

Ignoring an information request made by a union is risky but in cases like this, where there was no obvious connection between the stated purpose of the request, and bargaining unit employees made it easier. The fact the TCJA does not require the expenditure of any tax savings in a particular manner was fatal to establishing the relevancy of the union's requested information. Still, one can imagine that this case could have resulted in the issuance of a complaint but for the fact it occurred during the make-up of a more employer friendly NLRB.

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