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# NLRB Restores 50+ Year-Old Precedent: Employers (Once Again) May Unilaterally Stop Deducting Union Dues Upon Contract Expiration

**Labor Relations Update Blog** on **December 16, 2019**

Mid-December is always a time where one can expect significant decisions to issue from the NLRB. In recent years, we saw the Board, among other decisions, abandon the much criticized "micro unit" standard and the equally criticized handbook violation standard.

December is also one of the main times of year that a Board Member's term ends. December 16 was the last day of Member Lauren McFerran's term. As of December 17, the Board will have a bare quorum of three members (Chairman Ring, Members Emanuel and Kaplan), all of whom are Republican. There has been no indication that the two vacancies on the Board will be filled anytime soon, especially since 2020 is an election year.

In *Valley Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139 (2019), the NLRB restored precedent that had been in place for over 50 years prior to it being reversed in a 2015 decision. This case restores the bright-line rule that employers may unilaterally cease deducting dues upon the expiration of the contract.

***Factual Background***

A "checkoff" provision in a collective bargaining agreement provides that the employer agrees to deduct union dues from the pay of employees who have voluntarily signed-on for deductions, regardless of whether that employee is a union member, until the employee revokes such authorization as specified in the agreement.

In *Valley Medical Center*, the CBA between Valley Hospital and the Local Joint Executive Board (Culinary Workers Local 226 and Bartenders Local 165) in Las Vegas, Nevada had been expired for roughly 13 months when, on February 1, 2018, the employer stopped deducting Union dues. The expired agreement contained a checkoff provision that, by its terms, "continued in effect for the term of the Agreement." The Authorization form also stated that it was valid "during the term of the Agreement." While the agreement also had a "Union Shop" article, Nevada is a "right to work" state and the agreement also contained language that the Union Shop provision would not be applicable if it conflicted with state law. Accordingly, the Union Shop clause was void.

***NLRB Upends 50-Year Precedent in 2015***

In 1962, the Board issued *Bethlehem Steel*, 136 NLRB 1500 (1962), holding that unilateral termination of union-security and dues-checkoff provisions in an expired agreement was not only lawful, but *mandatory* pursuant to Section 8(a)(3) of the National Labor Relations Act. *Id*. at 1502. The Board noted that ceasing dues deduction was another form of economic warfare, just like a strike or lockout. The Board applied this rule for more than a half century until a new Board majority in 2015 abruptly reversed course in *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015).

There, the Board held that while some contractual provisions can be lawfully unilaterally changed upon CBA expiration (*e.g.*, no-strike, arbitration, and management-rights clauses), dues checkoff provisions were matters of "administrative convenience" and survived the term of the CBA. *Id.* at 1658. Further, the fact that dues checkoff provisions were created by contract did not mean the provisions expire with the contracts that created them.

***Majority Opinion Restoring Bethlehem Steel***

In *Valley Medical Center*, a majority comprised of Chairman Ring and Members Kaplan and Emanuel overturned *Lincoln Lutheran* and returned to *Bethlehem Steel*, focusing primarily on the contractual nature of dues-checkoff provisions. Though the Board agreed that dues-checkoff is a mandatory subject of bargaining, the Board acknowledged that there are some mandatory subjects that an employer *can* unilaterally terminate. The Board majority concluded that not all mandatory subjects of bargaining were equal. The relevant distinction between the two types of mandatory subjects lies between terms that can exist from the commencement of the bargaining relationship and terms that cannot exist until the parties affirmatively contract to them. The former, such as terms related to wages, pension and welfare benefits, hours, working conditions, and numerous others, are not as inextricably tied to an Agreement as the latter subjects like dues checkoff, no-strike, and mandatory arbitration provisions. The latter group are subject to statutory obligations *only* for the duration of a contract establishing them. *Valley Medical Center*, at *4.

The Board held that its return to *Bethlehem Steel* was warranted noting that *Lincoln Lutheran* conflicted with NLRA statutory bargaining principles. A rule restricting employers from unilaterally terminating dues-checkoff provisions undermined labor relations stability because parties negotiated under the *Bethlehem Steel* rule for more than five decades and were unprepared for the reversal. Further, the Board noted that this sudden shift was unsupported by any facts – *e.g.,* the majority in *Lincoln Lutheran* did not provide any statistics demonstrating how many employers actually chose to unilaterally terminate dues-checkoff provisions.

Finally, the majority decided to apply the revived rule to all pending cases.

***One of Member McFerran's Final Dissents***

Handed down on the final day of her five-year term, *Valley Medical Center* marked one of Member McFerran's final published dissents. In her dissent, Member McFerran framed the Majority's decision – along similar lines as other recent NLRB decisions – as permitting employers to "dispense with bargaining and [] make unilateral changes in employees' terms and conditions of employment." *Valley Medical Center*, at *9. In her view, the Majority failed to demonstrate how a rule that allows employers to unilaterally act serves to encourage bargaining.

Member McFerran took issue with the contractual distinction described above, arguing that nothing stops parties from setting up voluntary dues checkoff prior to reaching a collective bargaining agreement, and, unlike union-security provisions, there is no statutory requirement that dues checkoff provisions be included in a collective bargaining agreement to be lawful. *Id*. at *12. While the majority viewed *Valley Medical Center* as a return to lengthy precedent, the dissent repeatedly insisted that that precedent had been flawed from its inception, and there was thus no justification to revert to it.

***Takeaways***

The Board's decision restores an economic weapon taken away from employers in 2015. There is nothing in the decision that says unions may not collect dues, only that, post-expiration, the employer does not have to do it for them. The return to longstanding precedent likely will result in more successor agreements being reached without expiration.

The decision also provides employers with more clarity as to the definition of mandatory subjects of bargaining. Not all mandatory subjects are created equal and some, like union security and checkoff, are statutory and others are contractual creatures that once granted may be revoked upon expiration of the agreement.

It is very likely more significant decisions will be issued in the coming days and we will keep you posted.

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