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NLRB Restores Precedent, Gives Employers Freedom to Unilaterally Discipline Union Employees Between Certification and First Contract

Labor Relations Update Blog on **June 25, 2020**

The National Labor Relations Board continues to overrule Obama-Board precedent at a rapid pace. (See our prior blog posts here, here and here for a few recent examples.)

On June 23, 2020, in *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109, the Board overturned *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), which had required employers to provide notice and an opportunity to bargain to a newly-certified union on "serious" disciplinary action against unit employees, even before a collective bargaining agreement is in place. In doing so, the Board returned to a rule established 80 years ago that had permitted employers to discipline employees without first notifying or bargaining with a newly-certified union, provided that the action taken was consistent with established policy or practice preexisting the certification.

The ALJ's Application of Total Security

In *800 River Road*, the union was certified by the NLRB as the representative of certain employees at the employer's facility in 2012. The employer challenged the certification, which was ultimately upheld by the D.C. Circuit in 2017. Prior to the execution of an initial CBA with the union, the employer suspended three employees and discharged another pursuant to its then-existing disciplinary policy, without notice to the union. During contract negotiations months later, the employer informed the union of the discipline. An unfair labor practice charge was filed alleging that the employer had violated its duty to bargain over the discipline of the four employees.

Applying Total Security, an administrative law judge of the NLRB held that the employer's actions satisfied the definition of "serious discipline," and that the failure to provide the union with notice and an opportunity to bargain violated the NLRA.

800 River Road Overturns Total Security

In a unanimous opinion, the Board overturned *Total Security,* holding that the employer was permitted, without bargaining, to discipline the employees pursuant to its existing disciplinary policy. The Board's rationale for overturning *Total Security* was three-fold:

- First, *Total Security* conflicted with 80-years of precedent, which had not required employers to notify or bargain with a newly-certified union concerning the exercise of discretionary discipline imposed pursuant to an existing policy.
- Second, the *Total Security*-Board had misinterpreted the Supreme Court's application of the unilateral-change doctrine enunciated by the Supreme Court in *NLRB v. Katz*, emphasizing that not every action involving the exercise of employer discretion that results in a change of terms and conditions of employment requires notice to the union and an opportunity to bargain.
- Third, *Total Security* imposed confusing and burdensome obligations at odds with general principles of good faith bargaining, as it did not require the parties to negotiate either to agreement or impasse before permitting the employer to impose discipline, leaving it unclear when action could be lawfully taken. Moreover, requiring employers to bargain in advance over serious discipline interfered with their legitimate business needs by causing undue delay.

The ruling in *800 River Road* applies retroactively.

Takeaways

This decision is a clear "win" for employers, as the Board relieved management of an onerous and confusing bargaining obligation. In practice, it had been challenging to say the least for employers to distinguish "serious" discipline from garden–variety action not requiring notice and bargaining.

In addition, *Total Security* established no bright line as to when the bargaining obligation had been fully discharged, allowing the employer to proceed. This left employers in a quandary.

800 River Road frees employers engaged in first contract bargaining to act swiftly in addressing serious disciplinary issues, without union involvement, provided that the employer follows its existing practice and procedure in doing so.

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