While we might not all be successful at following through on our New Year’s resolutions, let’s hope the National Labor Relations Board’s (NLRB) new approach to deferral is here to stay. On December 23, 2019, the Board issued a new opinion that lowers the bar for deferring cases to the grievance arbitration process. This change means that employers in union environments will more easily be able to avoid unfair labor practices charges.

The Board recently addressed the correct standard for deferral in response to allegations that a company had engaged in unfair labor practices by terminating a
package delivery driver for opposing ratification of a new union contract by participating in a “Vote No” campaign.

Initially, the employee filed two grievances under the collective bargaining agreement, alleging that his termination violated both the union contract and Section 8(a)(3) of the National Labor Relations Act (the Act). A panel of two union representatives and two company representatives denied both grievances, finding that the termination was due to the employee’s violation of the company’s package delivery policy.

The employee then filed an NLRB charge, in which the administrative law judge declined to defer to the panel’s decision and, applying the heightened deferral standard set forth in Babcock & Wilcox Construction Co., Inc., 361 NLRB 1127 (2014), found the termination unlawful. Babcock, an Obama-era case, weakened the presumption of deferral to the grievance arbitration process and placed the burden on the party urging deferral to show that strict deferral requirements had been met.

On appeal, however, the Board overruled Babcock and reinstated the longstanding framework for analyzing deferral of charges that existed prior to the Obama era. Under the new standard, the Board will defer to an arbitration award if:

1. the arbitration proceedings were fair and regular,
2. the parties agreed to be bound,
3. the contractual issue arose from the same facts as the Board charge,
4. the arbitrator was presented with the facts relevant to resolve the unfair labor practice, and
5. the decision was not clearly repugnant to the purposes of the Act. Most importantly, the party arguing against deferral now has the burden of proof to demonstrate a defect in the arbitral process or award.

This change continues the current Board’s pattern of whittling away at the Obama-era Board’s regulations, and is one further step toward restoring the balance between protecting employers’ and employees’ rights. Additionally, the Board has ruled that it will retroactively apply this change regarding the standard and burden of proof to all pending cases.

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