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Arbitration Class Waivers, Past Practice (not established) and Skirmishing Over Information Requests All Part of Recent NLRB Action

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Since December 2017, when the Board issued a number of decisions which restored precedent that had been changed in the last few years, (discussed here, here, here, and here), not much of note has been happening at the Board. Indeed, there was not a full complement at the Board until April when Chairman Ring was confirmed.

Two upcoming events may see some additional activity at the NLRB. First, Board Member Pearce's term expires in a few weeks on August 27. This will leave the Board with four members. It is fair to assume a number of decisions may issue in the coming weeks as Pearce completes his term. No word on a replacement for Pearce. Second, the NLRB's fiscal year ends on September 30, 2018, and the preceding days up to and including that date usually see numerous decisions issue as the Board attempts to maintain its productivity statistics.

In the meantime, the NLRB recently issued a number of decisions that fall in the category of "business as usual," following existing precedent but with some interesting nuggets of information.

NLRB No Longer Pursues Class Action Waivers as Unlawful

Contrary to the vast majority of handbook cases, where the NLRB just finds a policy to be unlawful regardless of whether employees read it or if it was enforced, the Board's banning of class action waivers had real consequences. In May 2018, the Supreme Court ruled that there was no such violation of the NLRA. Consistent with the Supreme Court's ruling, the NLRB has started to dismiss existing cases where the Administrative Law Judge found a violation. See, for example, Kellog Brown & Root LLC, 363 NLRB No. 153 (August 2, 2018).

Employer Violated the Act by Refusing to Provide Union with Names of Witnesses To Sexual Harassment

In American Medical Response West, 366 NLRB No. 146 (July 31, 2018), the Board found an employer violated Section 8(a)(5) of the Act by refusing to provide the names of witnesses it had interviewed in connection with a complaint of sexual harassment lodged against a bargaining unit member. After an investigation, the employer discharged the accused employee. The union requested information related to the employer's investigation. The employer provided redacted witness interview notes but refused to provide the names. The union filed a charge and the ALJ concluded that the employer violated the Act.

On appeal, the NLRB noted that the provision of witness names has been the law for at least forty years, citing *Transport of New Jersey*, 233 NLRB 694-695 (1977). What makes the case interesting, however, is that the employer had asserted a need to maintain confidentiality in the early stages of the investigation. This assertion constituted the employer's defense. The NLRB rejected this defense, noting that the employer had "presented no evidence or argument to the Board to explain why its confidentiality interests should prevail over the Union's need for information." This conclusion was reached despite the employer having provided testimony that during the investigation the witnesses expressed concern of harassment or retaliation by the union.

The Board noted further that "even assuming the Respondent had demonstrated its confidentiality interests in protecting witness names outweighed the Union's need for the information, it nonetheless violated" the Act by "failing to seek an accommodation."

The content of information requests is rarely the issue and that is what makes an outright refusal to provide relevant information nearly indefensible. Of the few defenses that do exist, an employer cannot simply raise the defense and not provide the information. The employer can avoid liability by working to reach an accommodation with the union.

A Past Practice Must be Supported By Evidence Before the Board Will Enforce it.

One of the more misunderstood concepts in labor law is "past practice." A true past practice is something that is essentially an implicit agreement between the union and the employer on how certain things are done. Changing a past practice without bargaining with the union violates the Act. The NLRB recently rejected an assertion that past practice can be based on the perception of the union even when such belief is supported by an errant employer statement.

In Consolidated Communications Holdings, Inc., 366 NLRB No. 152 (August 3, 2018), the Board was confronted with a situation where the union claimed a past practice concerning how health care premiums were calculated was violated when the employer did not reduce premiums. In the parties' successive collective bargaining agreements, there was provision for the amount the employees had to pay for healthcare, which was expressed in a percentage of total cost. This is a common way of expressing healthcare in a collective bargaining agreement because it allows the amount employees pay to fluctuate based on the actual cost to the employer. The agreements, however, were silent on how the premiums were calculated.

During bargaining for a successor agreement an employer representative stated that it looked like premiums for the next year would be going down because there were not many claims. When the time came to adjust premiums, the rates were raised prompting the charge. The union's claim was that a practice existed where premium rates were based on the prior year's claims.

The employer denied expressing that premiums would go down. After evaluating credibility, the ALJ concluded that the statement had been made. The ALJ noted, however, that such a statement did not necessarily establish that was the employer's practice and evaluated the evidence. The ALJ noted that while the General Counsel had several witnesses testify as to their belief that premiums were sent on a single factor, it was "highly likely that the GC's witnesses are confusing a correlated factor (i.e., past year's claims are loosely correlated with the next year's premiums) with a single conclusive factor (i.e., past year's claims always and solely determine next year's premiums)." Perhaps most important, the ALJ ruled that the GC's position is compromised ***by the complete lack of any supporting documentary evidence***." (emphasis in original).

In his analysis, the ALJ set forth the basic law regarding unilateral change and expressed how it applies in the past practice context as follows:

> The Act bars employers from taking unilateral action on mandatory bargaining topics such as rates of pay, wages, hours of employment and other conditions of employment. . . .It is well-established that health benefits are mandatory bargaining topics. . An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even where such practices are not expressly set forth within a collective- bargaining agreement.

The ALJ noted that it was the burden of the party asserting the practice to establish that it existed and that in this case the General Counsel had failed to do so. The Board adopted the decision on appeal.

One wonders how this case ever made it to trial, and then appeal, when it appears there was no actual evidence as to the practice. Still, the decision is instructive in helping define the elusive term "past practice" and that even an employer's statement that bears no relationship to reality cannot establish such a binding practice.

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