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One Minute Memo®

HO, HO, HO! Gifts Arrive For The Labor Movement

With the holidays upon us, a sleigh full of gifts has been given to the labor movement as the NLRB issued decisions this week in a host of outstanding cases. Many of these decisions reflect major changes in Board policy and precedent that will greatly affect employers. And while some of these cases were decided last week before the Member Hayes, the lone Republican on the NLRB, left at the end of his term, others were decided by an all Democratic Member Board. With three pro-union members to issue decisions (and no Republicans on the Board to moderate their views with a dissent), the gifts are likely to keep on coming. Several of these decisions are addressed in detail on our labor relations blog. To review these, and to subscribe to keep up-to-date on NLRB activity, please *click here*.

A brief summary of the major decisions issued this week follows:

WKYC-TV, Inc., 359 NLRB No. 30 (Dec. 12, 2012): The Board overturned a rule it had established in 1962 that, absent an extension agreement, an employer was free to discontinue union dues deductions after a collective bargaining agreement expires. Unless a collective bargaining agreement clearly states that dues deductions may end with the expiration of the labor agreement, an employer will now need to continue deducting and remitting dues to a union. A full review of this decision is posted on our blog.

Alan Ritchey, Inc., 359 NLRB No. 40 (2012): The Board decided that newly organized employers normally cannot discipline employees without first notifying the union and bargaining over the decision. Although a few exceptions to the obligation to bargain before issuing the discipline (minor discipline, exigent circumstances) may exist and impasse need not be reached in negotiations before implementing discipline, an employer cannot act unilaterally and negotiations to agreement or impasse must follow. A full review of this decision is posted on our blog.

Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (2012): In its first decision to examine protected, concerted activity involving Facebook, the Board held that the employer committed an unfair labor practice by discharging five employees for responding to another employee's criticism of their work performance on Facebook. "Although the employees' mode of communicating their workplace concerns might be novel," the Board majority purported to apply established precedent to the Facebook postings and concluded this activity was for "mutual aid or protection" within the meaning of Section 7 of the National Labor Relations Act. A full review of this decision is posted on our blog.

United Nurses & Allied Professionals (Kent Hospital), 359 NLRB No. 42 (2012): The Board held that, under *Communications Workers v. Beck,* 487 U.S. 735 (1988), non-members who are required to pay dues under union-security clauses can be charged for lobbying expenses to the extent they are germane to collective bargaining, contract administration, or grievance adjustment. The Board also held that the union did not have to provide non-members with the auditor's verification letter showing that the union's breakdown of expenses was accurate.

Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (2012): The Board's three Democratic members found that a non-profit entity that operated an Illinois charter school was a private employer subject to the jurisdiction of the National Labor Relations Act. The decision overturned the opinion of the Acting Regional Director, who had ruled that the school was a political subdivision and thus governed by any applicable

state labor relations statutes.

Stephens Media LLC, d/b/a Hawaii Tribune-Herald, 359 NLRB No. 39 (2012): The Board held that an employer must produce to the union, upon request, witness statements signed by an employee during the course of a disciplinary investigation. The Board found inapplicable its more than 30-year-old rule in Anheuser-Busch, 237 NLRB 982 (1978), that the general duty to furnish information does not encompass the duty to furnish witness statements. To distinguish the documents in this case, the NLRB ruled that they were not witness statements because, even though the employee reviewed the statement and signed it, she never received any assurance of confidentiality from the employer. The Board further found the employer had failed to demonstrate the documents qualified as attorney-work product.

Supply Technologies, LLC, 359 NLRB No. 38 (2012): The Board found that the employer committed unfair labor practices by instituting and maintaining a mandatory grievance arbitration program, and threatening and disciplining employees who did not accept the program. The Board found the program was written in such a manner that employees would reasonably construe it as prohibiting them from filing NLRB charges or otherwise accessing the Board's processes -- activities protected by Section 7. While a provision in the policy indicated that employees were free to file charges with government agencies, the Board found that it chilled NLRA Section 7 rights because the language did not explicitly reference the NLRA or NLRB or explain that the filing of administrative charges was an exception to the requirement that all claims be brought under the ADR process. The Board considered the language to be ambiguous at best.

Latino Express, Inc., 359 NLRB No. 44 (2012): The Board held that, in order to provide make-whole relief when awarding back pay, the employer must compensate employees for any extra taxes they pay as a result of receiving the backpay award in a lump sum. Moreover, employers required to pay back pay must file the necessary reports with the Social Security Administration in order to allocate the back pay properly to the years in which it would have been earned.

Several of these decisions likely will be appealed, and the Board's current track record in the courts is not great. Moreover, there are other highly anticipated cases still pending before the Board, and we expect more decisions shortly. To keep apprised of the NLRB's actions, please subscribe to our labor relations blog.

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