PUBLICATION

The National Labor Relations Board Expands Union Access to Witness Statements

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On June 26, 2015, in a split 3-2 decision, the National Labor Relations Board (Board), overturned the 37-year-old standard protecting the confidentiality of witness statements taken by employers during workplace investigations from unions. Piedmont Gardens, 2015 NLRB LEXIS 500, 362 NLRB No. 139, 362 NLRB No. 139 (N.L.R.B. June 26, 2015). The prior standard was a bright line rule that protected the confidentiality of witness statements. The new standard is a balancing test between the employer's need to protect the privacy of witness statements and a union's need for information.

In 1978, the Board held that the general duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Anheuser-Busch, Inc.,* 237 NLRB 982, 984-985 (1978). In *American Baptist Homes of the West (Piedmont Gardens)*, 359 NLRB No. 46, at *1 (Dec. 15, 2012), the Board "decided ... to overrule *Anheuser-Busch* and to apply [a] balancing test in future cases where the employer argues that it has a confidentiality interest in protecting witness statements from disclosure." Like *Anheuser-Busch*, the test would apply to grievance processing and arbitration. However, at the time the 2012 decision was made, three Board members had joined the Board by way of recess appointments later found to be illegal by the United States Supreme Court. See *NLRB v. Canning*, 134 S. Ct. 2550 (U.S. 2014). The recent *Piedmont Gardens* decision was made with a full Board and with all members properly appointed.

The new balancing test only applies prospectively from June 26, 2015. In applying the balancing test, one must first decide whether the statement falls within the definition of a witness statement and determine whether promises of confidentiality were made. If the witness statements are relevant, the employer must consider whether its confidentiality defense, in light of its reasons for the promise of confidentiality, outweighs the union's need for the information. The employer must raise its confidentiality concern in a timely fashion. Therefore, if the union makes a request for witness statements, the employer should promptly respond and explain that the statements will not be turned over due to legitimate business concerns about witness intimidation or other factors approved by the Board. Additionally, the employer must seek an accommodation from the union, rather than simply refusing to provide the statements. An accommodation could include providing the names of those who gave statements, the names of those whom the employer intends to call to testify at a hearing, and possibly a summary of the witness statements or the like. If an accommodation is offered, an employer will be better positioned to defend itself in any unfair labor practice proceeding.

Board members Philip A. Miscimarra and Harry I. Johnson III, the dissenters in the 2015 *Piedmont Gardens* decision, rightfully pointed out that the workplace investigation rules as they relate to unionized workforces have now been made more unpredictable and difficult to comply with for employers. In practice, the evisceration of the bright line rule in favor of a balancing test is likely to make workplace investigations more complicated and expensive for unionized employers. Further, many employers may find their employees less willing to make complaints, thereby hampering their efforts to run a fair, safe and lawful workplace.