

NLRB Extends Its Gift-Giving Season to Employers

January 22, 2020

The National Labor Relations Board (NLRB) closed 2019 with several decisions and rule changes that overturned recent board precedent and revived older, more employer-favorable standards.

On December 16, 2019, the NLRB decided three cases that fit this pattern: *Valley Hospital Medical Center, Inc. D/B/A Valley Hospital Medical Center And Local Joint Executive Board of Las Vegas*; *Caesars Entertainment D/B/A Rio All-Suites Hotel and Casino And International Union of Painters and Allied Trades, District Council 16, Local 159, AFL-CIO*; and *Apogee Retail LLC D/B/A Unique Thrift Store And Kathy Johnson*. On December 23, the Board followed up with its decision in *United Parcel Service And Robert C. Atkinson, Jr.* These decisions involve disparate areas of Board law, but all indicate that the Board will continue to emphasize the need to give management more room to exercise discretion for at least as long as the Republican-appointed majority remains on the Board.

In *Valley Hospital Medical Center*, the NLRB overturned the 2015 decision in *Lincoln Lutheran*, which held that there was a statutory obligation to check off and remit dues after the expiration of a collective bargaining agreement. The Board returned to precedent from *Bethlehem Steel* in 1962 that held there is no obligation for an employer to continue collecting and remitting union dues to the union after a collective bargaining agreement expires. The Board's rationale turns on the distinction between purely contractual and statutory obligations. Thus, the obligation to collect and remit will endure if the parties extend the agreement while negotiating, but will cease if the parties negotiate without a contract while leaving prior terms in place until impasse is reached. The same analysis will likely pertain to no-strike/no-lockout provisions and the requirement to resort to the grievance arbitration system.

The Board's decision in *Caesars Entertainment* reestablished an employer's right to ban employees from using its email or other systems for union organizing and other protected activities so long as it does so on a non-discriminatory basis, and subject to possible exception if the employer system is the only feasible means of communications with employees (for example a virtual company with no brick-and-mortar location). In reaching this result, the Board overturned its 2014 *Purple Communications* decision, which extended broad rights to use email and other employer systems for union activity, and reinstated the law as it existed in 2007, as declared in its *Register Guard* decision. Under the reestablished standard, employers will need to consider their email use policies much like their general solicitation policies. The more freedom employees are given to make personal use of email, the harder it will be to argue that a ban aimed at union communications is permissible.

In the third December 16 decision, *Apogee Retail LLC*, the Board approved the right of employers to have a blanket policy requiring confidentiality of investigatory interviews for the period in which the investigation remains open. In doing so, it overturned the 2015 decision in *Banner Estrella Medical Center*, which required employers to prove, on a case-by-case basis, the need for a confidentiality bar. A policy is lawful to the extent it prohibits discussion of what occurred in the interview or disclosure of facts the employee only learned through the interview; however, it may not prohibit the employee from discussing his firsthand knowledge of underlying facts with the union, co-workers or government agencies.

The NLRB a week later gave its final decision of 2019 in *United Parcel Service, Inc.*, and held that in determining whether to defer to an arbitrator's decision in cases alleging discriminatory discharge or discipline on account of union activities, the party seeking deference will no longer have to show that the arbitrator actually considered the statutory

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discrimination issue and decided it correctly. Instead, the Board returned to the longstanding *Spielberg/Olin* standard which requires only that the issues in arbitration be factually parallel, that the facts relevant to the statutory issue have been presented and that the arbitrator's decision not be "repugnant to federal labor law." The return to this standard should greatly reduce a discharged employee's opportunities to take multiple bites at the apple.

Collectively, these decisions mark a continued push towards employer-friendly decisions by the Board. Miller Canfield will continue to monitor the decisions of the NLRB for developments. In the interim, if you have any questions, would like more information or have concerns about how these NLRB decisions might affect you, your employees, or your organization, please contact any of the authors or your Miller Canfield attorney.