

July 6, 2015

NLRB Rules Witness Statements No Longer Automatically Protected from Union Disclosure

On June 26, 2015, the NLRB (“Board”) overruled, in a case titled *American Baptist Homes of the West*, its 45-year old precedent regarding the discoverability of witness statements. When an employer is faced with workplace misconduct, it will often conduct an investigation. During that investigation, it may obtain witness statements. In some cases, there are fears of retaliation or other concerns that make it appropriate to protect the witnesses’ identities and statements, and assure the witness that his or her statement will be kept confidential. When a union represents an employee negatively affected by witness statements, the union often requests copies of them.

No longer is an employer entitled to a “blanket exemption” from disclosure for witness statements. Instead, an employer must justify a “legitimate and substantial confidentiality interest” that outweighs the union’s need. This same test is used when an employer refuses to provide witness names and job titles, for which there is also no blanket protection.

The case began when a charge nurse complained that a CNA was sleeping on duty. The company asked the charge nurse to prepare a written statement. Additional witness statements were obtained during the investigation, including from another charge nurse. Based on the results of the investigation, the CNA was terminated. The union representing the CNA and all the company’s certified nursing assistants at that facility filed a grievance on behalf of the fired CNA. As part of the grievance process, the union asked for the identities, job titles, and statements of all witnesses.

According to a 1967 decision by the United States Supreme Court, involving *Acme Industrial Co.*, employers are required to respond to union information requests related to a grievance. However, since 1978, in a Board decision involving *Anheuser-Busch, Inc.*, employers have been able to assert a “blanket exemption” for witness statements and identities.

In the recent *American Baptist* decision, the Board overrules that 1978 precedent in *Anheuser-Busch* by holding witness statements are not entitled to automatic protection. To be sure, the Board emphasizes, there may be circumstances where witness statements may be held confidential, but as a general principle, the Board declared they would no longer enjoy protection as a default:

"Like the disclosure of witness names, the disclosure of witness statements may raise legitimate and substantial concerns of confidentiality or retaliation in some cases. Nothing in our decision today precludes the assertion of those concerns in response to an information request or the Board's (or a reviewing court's) subsequent consideration of them. But there is no basis for concluding that all witness statements, no matter the circumstances, warrant exemption from disclosure."

The Board does not explain what circumstances are sufficient to establish “legitimate and substantial concerns of confidentiality or retaliation.” However, the Board gives some sense of the kind of circumstances that would be sufficient in the following quote:

July 6, 2015

“We recognize that, in some cases, there are legitimate and substantial confidentiality interests that must be accommodated, including the risk that employers or unions will intimidate or harass those who have given statements, or that witnesses will be reluctant to give statements for fear of disclosure.”

Because the decision conflicts with previously established law and radically alters the course of Board precedent, it is likely to be challenged in court and reviewed skeptically by future Boards. In the meantime, employers with unionized workforces should review *American Baptist*. It may be that witness statements need to be produced during future grievances. Employers may, however, be able to assert protections in appropriate circumstances.

Bill C. Berger

Shareholder

bberger@bhfs.com

303.223.1178

Hannah L. Misner

Associate

hmisner@bhfs.com

303.223.1258

This document is intended to provide you with general information regarding NLRB rules on the discoverability of witness statements. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.