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NLRB Revisits and Overturns Longstanding Precedent Regarding Disclosure of Witness Statements

As we reported in the January 22, 2013 New York Labor and Employment Law Report blog post, the National Labor Relations Board issued the *American Baptist Homes of the West ("Piedmont Gardens")* decision in December 2012, overturning more than 30 years of precedent shielding witness statements from disclosure. In June 2014, however, the Supreme Court handed down the *Noel Canning* decision, in which it found that President Obama's January 2012 Board appointments were invalid and thus the Board lacked the necessary quorum of three members to issue valid decisions from that date until August 2013 (when a full five-member Board was properly appointed). As Piedmont Gardens was one of the Board decisions invalidated by the *Noel Canning* ruling, the Board issued an order setting aside the decision but retained the case on its docket.

After reconsidering the case, the Board issued a decision on June 26, 2015, reaffirming its earlier decision. In doing so, the Board overruled the blanket exemption — first established by the Board's 1978 *Anheuser Busch* decision — that allowed employers to withhold witness statements in response to pre-arbitration requests for information. Arguing that the *Anheuser Busch* rationale was "flawed," the Board held that such statements are now subject to the same standard applicable to all other union requests for information: an employer must furnish "relevant" information that is "necessary" to the union's proper performance of its duties as collective bargaining representative.

Under this new standard, an employer that seeks to withhold the production of witness statements on "confidentiality" grounds must first establish that: (i) witnesses need protection; (ii) evidence is in danger of being destroyed; (iii) testimony is in danger of being fabricated; and (iv) there is a need to prevent a cover-up. As the Board took pains to point out, "a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of employment investigations."

If the required confidentiality showing can be made, the Board would then weigh the employer's interest in confidentiality against the union's need for the information. Even if the Board finds that the confidentiality interest outweighs the union's need, the employer cannot simply refuse to provide the information but "must seek an accommodation that would allow the [union] to obtain the information it needs while protecting the [employer]'s interest in confidentiality."

This decision places yet another unnecessary burden upon employers. The Board cites no evidence that the old standard hamstrung unions in performing their collective bargaining duties. Under *Anheuser Busch*, unions were still entitled to witness names and could conduct their own investigations. Now employers can offer no assurance of confidentiality to employees, who will likely be more hesitant than ever to provide truthful accounts against their union brethren for fear of reprisal.

In the wake of this decision, employers should reassess their investigatory methods, including best practices for preserving confidentiality, and avoid blanket rejections of union requests for witness statements.

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