

Hall, Render, Killian, Heath & Lyman is a full service health law firm with offices in Indiana, Kentucky, Michigan and Wisconsin. Since the firm was founded by William S. Hall in 1967, Hall Render has focused its practice primarily in the area of health law and is now recognized as one of the nation's preeminent health law firms serving clients in multiple states. For more information about the firm please visit us at www.hallrender.com.

Office Locations

Indiana Office

One American Square
Suite 2000
Indianapolis, IN 46282
(317) 633-4884
Contact: Stephen W. Lyman

Kentucky Office

614 West Main Street
Suite 4000
Louisville, KY 40202
(502) 568-1890
Contact: Sam DeShazer

Michigan Offices

Troy Office

Columbia Center, Suite 315
201 West Big Beaver Road
Troy, MI 48084
(248) 740-7505
Contact: Gregory W. Moore

Lansing Office

110 W. Michigan Avenue
12th Floor
Lansing, MI 48933
Contact: Gregory W. Moore

Wisconsin Office

111 East Kilbourn Avenue
Suite 1300
Milwaukee, WI 53202
(414) 721-0442
Contact: Robin M. Sheridan

Contact Us

hallrender@hallrender.com

NLRB Issues a Series of Seven Significant Labor Relations Decisions

Executive Summary

The National Labor Relations Board ("NLRB") is the federal agency that enforces the National Labor Relations Act ("NLRA") which is the federal law that generally governs the relationships between non-governmental employers and their employees. In late September the NLRB issued a series of seven decisions that changed the course of the law in several significant areas that have been important for employers. These decisions address issues involving: (1) allowing employees to decertify a union that had been voluntarily recognized by an employer based on a majority of signed union cards; (2) allowing an employer to permanently replace economic strikers by hiring "at-will" employees as replacements; (3) requiring union "salts" to have a genuine interest in an employment relationship before gaining the protections of the NLRA; (4) preventing reinstatement of employees discharged for misconduct discovered by the employer's unlawfully hidden cameras; (5) allowing an employer to bring a reasonably based lawsuit against a union regardless of the employer's retaliatory motive; (6) inserting language on the NLRB's election ballots to the effect that the NLRB does not endorse any choice in the union election; and (7) allowing an employer to end the union dues checkoff when the collective bargaining agreement expires. These decisions were all based on a conservative reading of the protections afforded employees under the NLRA. All in all the NLRB's actions can be seen as helpful to employers.

Detailed Analysis

The NLRA protects the rights of employees employed by non-governmental employers to organize, form, join or assist labor organizations, to bargain collectively and to engage in other concerted activities for their own protection. The NLRA also protects the right of employees to refrain from engaging in such activities. The NLRB is made up of five members appointed by the president who serve staggered terms. Sometimes, depending on the make up of the NLRB, established legal precedent may be overruled by a current NLRB majority. That happened recently when the NLRB issued several 3 to 2 decisions that roll back previous decisions of the NLRB. In general, these seven decisions are favorable to employers and for employees who might wish to refrain from engaging in union activities. These decisions are summarized below.

- 1. Employees now have 45 days to file a decertification petition when a union is voluntarily recognized by an employer based on a card-check majority.**

An employer may legally recognize a union based on the union's tender of authorization cards signed by a majority of the employees in an appropriate bargaining unit. Once an employer granted recognition there could be no

challenge to the majority status of the union for at least a year and, if a contract was signed, for the duration of the contract. This had been the NLRB's position since 1966. In a 3 to 2 decision the NLRB modified that long-standing position. Now the NLRB will allow a challenge to the recognition of a union by timely filed decertification petition. The NLRB established new rules (to be applied retroactively) to carry out its decision. According to these new rules, the employer or the union that is party to a voluntary recognition agreement must promptly notify the Regional Office of the NLRB of the grant of voluntary recognition along with a copy of the recognition agreement and a description of the bargaining unit. The NLRB will then send an official notice to the employer that must be posted in conspicuous places in the workplace informing employees that a decertification petition supported by at least 30% of the employees in the unit can be filed within 45 days of the date of the posting of the notice. The NLRB's notice also informs the employees that if no decertification petition is filed within 45 days, then the majority status of the union will be conclusively presumed. These new rules will likely lead to the filing of decertification petitions filed by employees who don't want to be represented by a union.

Reference: Dana Corp., 351 NLRB No.28 (Sept. 29, 2007).

2. Employers can lawfully permanently replace economic strikers with "at-will" replacement employees.

An employer faced with an economic strike by its employees is legally entitled to permanently replace those employees who have gone on strike. If an economic striker makes an unconditional offer to return to work the striker is entitled to immediate reinstatement unless the employer has hired a permanent replacement for the striker. Many employers hire employees on an "at-will" basis whether or not they are replacements for strikers. The NLRB had previously taken the position that employers who hired permanent replacements for strikers on an "at-will" basis could not establish that the replacements were indeed permanent. Therefore, the strikers were legally entitled to replace the non-permanent replacements. In a 3 to 2 decision, the NLRB clarified that position. The NLRB held that employers who hire strike replacements, telling them that they were "at-will," employed for "no definite period" and could be terminated for "any reason at any time with or without cause," can successfully argue that the replacements were permanent. This decision eliminates some of the uncertainty for employers when faced with operating their facilities with replacement employees during a strike.

Reference: Jones Plastic & Engineering Co., 351 NLRB No. 11(Sept. 27, 2007).

3. Union "salts" must have a genuine interest in employment in order to be protected by the NLRA.

Some unions use "salts" as an organizing tactic. The union sends their members known as "salts" to an employer to complete an application for employment in which they disclose that they are union organizers and wish to unionize the employer. Many times the union applicant has no real desire to be hired and only hopes to catch the employer in an unfair labor practice by denying employment because of the union affiliation that was disclosed on the application. If the union applicant is denied employment, the union will then often file unfair labor practice charges with the NLRB as a pressure tactic asserting that the denial of employment was based on the applicant's expressed union sympathies. In the past this union tactic flooded the NLRB

with charges based on applicants who had no real interest in obtaining employment. Employers were forced to defend at great expense. In a 3 to 2 decision the NLRB now requires a showing that the applicant reflect a genuine interest in becoming employed by the employer. The employer must also challenge the genuineness of the application. In other words, the NLRB will no longer conclusively presume that the applicant is entitled to the protections of the NLRA by the mere fact of submitting an application for employment.

Reference: Toering Electric Co., 351 NLRB No. 18 (Sept. 29, 2007).

4. Employees who are discharged based on employer's unlawful use of hidden camera may not be reinstated or receive back pay.

In another 3 to 2 decision, the NLRB held that employees who were caught engaging in misconduct by a hidden video camera that had been installed by their employer, without bargaining with their union, were not entitled to reinstatement or back pay. In this case, the NLRB found that the employer had unlawfully installed the hidden camera without first bargaining with the union. It ordered the employer to cease and desist from unlawfully installing cameras without first bargaining about it. The NLRB also held that the employees who were caught by the hidden camera were not entitled to reinstatement or back pay, even though the employer had committed an unfair labor practice that led to the discharges. The union appealed to the Federal Court of Appeals. The appeals court upheld the NLRB's finding of an unfair practice by installing the camera but sent the case back to the NLRB to reconsider its refusal to order reinstatement of the discharged employees. The NLRB did reconsider its previous decision and reaffirmed it, stating that employees who violate company rules should not benefit from their misconduct through a windfall award of reinstatement and back pay.

Reference: Anheuser-Busch, Inc., 351 NLRB No. 40 (Sept. 29, 2007).

5. An employer's reasonably based lawsuit against a union is not an unfair labor practice.

The NLRB has held in the past that an employer's unsuccessful lawsuit against a union can be an unfair labor practice if it was instituted for retaliatory reasons. On appeal the U.S. Supreme Court addressed that issue and remanded the case to the NLRB to consider the free speech aspects of the First Amendment. The NLRB was directed to determine whether the threat of an unfair labor practice charge could chill an employer's exercise of their First Amendment rights by making the filing of a reasonably based lawsuit too risky. The NLRB did reconsider and, in a 3 to 2 decision, held that lawsuits that have a reasonable basis cannot be found to be an unfair labor practice even if the employer ultimately loses its case and even if the employer's motive for instituting the lawsuit was retaliatory. This holding removes some of the risk for employers that have legitimate claims against a union.

Reference: BE&K Construction Co., 351 NLRB No. 29 (Sept. 29, 2007).

6. Union election ballots will now contain a statement that the NLRB does not endorse any of the choices on the ballot.

When the NLRB conducts a secret ballot election to determine union representation at an employer's facility it requires the employer to post a

notice containing a sample ballot. The ballot generally contains the simple question: "Do you wish to be represented by the [Union] for purposes of collective bargaining? YES / NO." Sometimes the sample ballot might be defaced by unknown persons with an "X" in one box or another. In a case where the impression caused by the defacement seemed to suggest that the NLRB was endorsing the union, the NLRB decided that in the future a disclaimer will be added to its official and sample ballots. The new disclaimer language will state: "The National Labor Relations Board does not endorse any choice on this ballot. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board." This language removes any hint that the NLRB supports the union in the election.

Reference: Ryder Memorial Hospital, 351 NLRB No. 26 (Sept. 28, 2007); General Counsel Memorandum OM 08-09 (November 7, 2007).

7. An employer may unilaterally cease union dues checkoff at the expiration of the collective bargaining agreement.

Unions depend on the "checkoff" provision, common to most union collective bargaining agreements, for the collection of union dues from its members. Under the checkoff, the employer is required to deduct the amount of union dues from employee paychecks and remit that money directly to the union. Without a checkoff provision in the agreement, the union would be forced to collect its union dues directly from each of its members individually. Generally, when a collective bargaining agreement expires, an employer may not make unilateral changes in the terms of employment. However, in a 3 to 2 decision, the NLRB held that the employer that stopped withholding union dues from employee paychecks when the collective bargaining agreement expired did not violate the NLRA. The outcome of this case turned on the specific language contained in the collective bargaining agreement. That language clearly provided that the union dues checkoff "shall be continued in effect for the term of this Agreement." Thus, despite the union's protest, the NLRB held that the agreement means just what it says. Because it all depends on the specific language of the agreement, employers should always attempt to negotiate clear language that sets out exactly what is intended.

Reference: Hacienda Resort Hotel & Casino, 351 NLRB No. 32 (Sept. 29, 2007).

These seven NLRB decisions are remarkable because they all came down within days of each other and all involved 3 to 2 splits among Board members along party lines. These decisions could be rolled back if the make up of the NLRB changes with a change in administration. These decisions could also energize labor to push for congressional action to change the course of the law. In any event, there is much happening on the labor front and employers should be aware of the changing landscape.

Should you have any questions, please do not hesitate to contact your regular Hall Render attorney or Steve Lyman, or Jon Bumgarner at Hall, Render, Killian, Heath & Lyman, P.C. at 317/633-4884.

This publication is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader must consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.