MAY 27, 2015

UNION GRIPE CAN BE A REQUEST TO BARGAIN

Under the National Labor Relations Act ("NLRA"), prior to implementing changes to wages, hours or other terms and conditions of employment, employers are required to give the union notice and an opportunity for bargaining. Once the union has received notice of a potential change, it is required to request bargaining in order to preserve its right to bargain with the employer regarding the change. Only after the union has requested to bargain is the employer required to bargain with the union prior to implementation of any changes.

CHANGE TO SERVICE RECOGNITION PLAN

On May 21, 2015, the Board had occasion to analyze what type of action from the union would constitute a request to bargain. In this recent case, the employer maintained an Employee Service Recognition Plan ("ESRP") that provided employees with one time monetary awards of increasing value for every 5 years of service. For example, the value of the award was $35 at 5 years, $69.50 at 10 years, $75 at 15 years and $101 at 20 years. The award value increased in 5-year increments up to 50 years of service. The employer had made several changes to the ESRP over the years, mostly through unchallenged unilateral actions.

"OH NO YOU DON'T ..."

On September 18, 2012, the employer's Director of Labor Relations called the union representative and informed him of several planned changes in various employment policies of the employer. Just one of these planned changes was a change to the ESRP so that employees received awards for every 10 years of service rather than every 5 years of service. In response, the union representative said, "[O]h no you don't! Again? Now you know I have to file a board charge" and stated that he would "ha[ve] to come to Akron [the Respondent's headquarters] for this one." Despite the fact that these comments were made after the employer described proposed changes to three other employment policies and the absence of the word "bargain" or any similar language (e.g., "discuss," "negotiate," "confer"), the Board (in a 2-1 decision) held that the statements of the union representative constituted a request to bargain over the change to the ESRP.

Board Member Miscimarra filed a dissenting opinion. Member Miscimarra pointed out that an employer does not violate the Act unless the union makes a request that "clearly indicates a desire to negotiate and bargain." Member Miscimarra, citing several other Board decisions, concluded that the union representative's statements merely signified an objection or protest, which have historically failed to qualify as requests for bargaining.

HEADS-UP FOR EMPLOYERS

Nevertheless, at least for now, the majority's conclusion is the law. In light of the Board's latest departure from precedent, employers should be cognizant of what may be construed as a request to bargain. When notifying the union about a planned change in the terms and conditions of employment, employers are well-advised to communicate with the union in writing. The union's response, even if it appears to be a mere gripe, should be considered and clarified in order to avoid a subsequent ULP.

Reference: Ohio Edison Co., 362 NLRB No. 88 (May 21, 2015)

If you have any questions, please contact Brad Taormina at btaormina@hallrender.com, Bruce Bagdady at bbagdady@hallrender.com, Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.