Insight

IN-DEPTH DISCUSSION

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Board Overrules Longstanding Protections Against Disclosure of Witness Statements

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Background

Since 1978, the National Labor Relations Board (NLRB) has treated witness statements as exempt from an employer's general duty to furnish information to unions under Section 8(a)(5) of the National Labor Relations Act (NLRA). The NLRB first articulated this rule in *Anheuser-Busch, Inc.*, 237 NLRB 982, 984–985 (1978), where the Board held that the general duty to furnish information "does not encompass the duty to furnish witness statements themselves." Although the Board generally required an employer to provide summaries of the content of witness statements, under *Anheuser-Busch*, an employer could lawfully refuse to provide the witness statements themselves. A key policy rationale for this categorical rule was to protect the integrity of employer investigations and to protect witnesses from reprisal and intimidation, particularly employees who provided incriminating information against fellow bargaining unit members.

On June 26, 2015, in *Piedmont Gardens*, 362 NLRB No. 139 (June 26, 2015), the NLRB overruled *Anheuser-Busch, Inc.* and articulated a new test for analyzing whether an employer is obligated to disclose witness statements under the NLRA.

The Board will now analyze an employer's duty to disclose witness statements under the framework of *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). Under *Detroit Edison*, the Board balances the union's need for the requested information against any "legitimate and substantial confidentiality interests established by the employer." The Board in *Piedmont Gardens* did not foreclose an employer's ability to withhold witness statements from disclosure based on confidentiality concerns, but instead ruled that such concerns must be supported by the particular facts of the case, as weighed against the union's need for such information. The Board did not identify any specific factors which would tend to justify nondisclosure, although it did allude to the original concerns underlying the *Anheuser-Busch* rule—fear of reprisal and intimidation—as possible justifications. However, justification must now be established by the specific circumstances of the case, rather than presumed as a general matter or asserted without factual support.

Facts

In *Piedmont Gardens*, the employer was advised that an employee might have been sleeping on the job, as witnessed by fellow bargaining unit members. The employer requested that one of the witnesses voluntarily provide a statement outlining her observations, and assured her that her statement would remain confidential. Another employee voluntarily provided a separate witness statement after learning that her co-worker had done so as well. After completing its investigation, the employer terminated the sleeping employee, and the union grieved and requested the witnesses' names, job titles, and copies of the statements. Citing *Anheuser-Busch*, the employer refused to provide any of the information.

The union filed an unfair labor practice charge based on the employer's refusal to provide the requested information, and an administrative law judge ruled that the employer violated the Act by not disclosing the witness names, but was privileged under *Anheuser-Busch* to withhold the witness statements.

Majority's Decision—No Categorical Protection for Witness Statements

The union and NLRB General Counsel requested that the Board overrule *Anheuser-Busch* and the Board agreed, finding its rationale "flawed" and instead finding it appropriate to apply the balancing test of *Detroit Edison*, which applies more broadly to union requests for information considered confidential by employers. Under *Detroit Edison*, the Board applies the following test to evaluate requests for confidential information:

If the requested information is relevant, the party asserting the confidentiality defense has the burden of proving that it has a legitimate and substantial confidentiality interest in the information, and that it outweighs the requesting party's need for the information.

The majority first noted that a union's right to information in the context of grievance prosecution was liberally interpreted under *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) to require disclosure of information relevant to the processing of grievances. The majority found no reason to treat witness statements differently, noting "we reject the premise of *Anheuser-Busch* that witness statements are unique and fundamentally different from the types of information contemplated in *Acme*."

The Board also rejected *Anheuser Busch's* reliance on *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), which shielded NLRB witness statements from prehearing disclosure under the Freedom of Information Act, based in part on concerns regarding the potential coercion and intimidation of witnesses. The Board found that *Robbins* was premised more on issues unique to FOIA requests and the NLRB's enforcement mechanisms, rather than the broader policy concerns about witness coercion and intimidation.

The majority also noted *Detroit Edison* was decided after *Anheuser-Busch* and had been broadly applied to requests for other types of confidential information, including requests for witness names. Noting that there has been no blanket prohibition against the disclosure of witness names, the majority saw no reason for a different rule with respect to witness statements, which it claimed should be subject to the more "flexible" approach of *Detroit Edison*.

The majority acknowledged that "the disclosure of witness statements may raise legitimate and substantial concerns of confidentiality or retaliation in some cases" and that nothing in its decision precluded employers from raising such concerns in response to union requests for witness statements. The Board majority cited a number of decisions in which it had upheld an employer's stated confidentiality interests in refusing to require the employer to provide witness names, suggesting that its newly-announced rule would not necessarily require production of witness statements in every instance.

However, nothing in the Board majority's opinion tells employers how they might establish "legitimate and substantial" confidentiality concerns, and the Board made clear that any such assertions will be evaluated "based on the specific facts of each case." The Board suggested that specific evidence of a need for witness protection, danger of destruction or fabrication of witness evidence, or a cover up might justify refusal to provide the statements.

The Board refused to apply its new rule retroactively, acknowledging that it represented a "departure from longstanding precedent."

Sharp Dissents Criticize Majority's Reasoning and Attack Erosion of Employer Investigations

Members Miscimarra and Johnson issued sharp dissents criticizing the majority's reasoning and raising broader policy concerns about the effect of the decision on the integrity of employer investigations.

Member Miscimarra characterized the decision as part of a "trilogy" of cases "substantially undermining employer investigations." That trilogy included one case subjecting an individual employee complaint, unrelated to the NLRA, to the full array of NLRA protections (*Fresh and Easy Neighborhood Market*), and another rejecting an employer's confidentiality instruction during the course of an internal investigation (*Banner Estrella Medical Center*).

Member Miscimarra noted an employer's broad duties to conduct a variety of workplace investigations in order to comply with numerous federal statutes, and lamented the "predictable result" that fewer employees will be willing to come forward and provide relevant information because an employer will not be able to assure the witness confidentiality of any witness statements provided. Miscimarra expressed concern that under the majority's standard an employer will rarely be able to establish a legitimate confidentiality interest in the first place, and thus the majority's "balancing" test will never come to fruition.

Member Miscimarra also noted that the majority's rule, with its case-by-case focus, will likely breed more litigation which, coupled with the Board's recently-narrowed standard for deferring to arbitration, would continue the trend toward "two track" litigation in arbitration cases, thus undermining the efficiencies underlying the entire arbitration process.

Member Johnson noted the *Robbins Tire* court's rationale for a rule against production of witness statements, centered in large part on concerns about witness coercion and intimidation, and found the "same considerations" continued to exist and supported the *Anheuser-Busch* rule. Member Johnson rejected the majority's case-by-case requirement that an employer establish facts justifying these concerns, given that the Supreme Court recognized those concerns as a matter of law in *Robbins Tire*.

Echoing Member Miscimarra's observations regarding the complexity of industrial work environments and the numerous compliance obligations employers face and are required to investigate in the event of a suspected violation, Member Johnson noted "many employers rely on witness statements as their main investigation tool for investigating employee misconduct and ensuring legal compliance" and that the "full and candid participation of employees" was required to effectively investigate workplace conduct that implicates a variety of federal statutes.

Member Johnson noted that no less than the EEOC, by its own internal investigation procedures, recognizes the need for confidentiality and its central importance to the integrity of investigations. Member Johnson noted a variety of reasons, as a practical matter, that employees will be reluctant to come forward with information implicating co-workers, and lamented that the Board's longstanding "common sense" approach to protecting witness statements is "fundamentally thwarted" by the majority's decision.

Take-Aways

Employers should evaluate union requests for witness statements on a case-by-case basis. Employers should not refuse to produce witness statements absent a specific and "substantial" justification for the refusal, based on the facts of the case. Employers can expect increasingly aggressive requests by unions for such information in the pre-arbitration setting, and employers should be wary of assuring confidentiality to witnesses in internal investigations. By the same token, when and if an employer becomes aware of facts (e.g., witness tampering or intimidation) that give rise to a confidentiality justification, the employer should document such incidents to support its position against disclosure.

Employers also may want to consider how best to approach witnesses given this new standard. Given that confidentiality can no longer be guaranteed, employers in some cases may need to convince witnesses to nevertheless provide statements, such as by agreeing to limit or carefully phrase certain details in a statement or informing the witness clearly and specifically that he or she has a right to raise issues of retaliation, and that action will be taken if retaliation occurs. Another option might be having the investigator take notes rather than having the witness provide a written statement, so that the witness can state to the union or to co-workers that he or she did not give the employer a witness statement but only provided answers to the employer's verbal questions.