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# As 2012 Ends, So Does the NLRB's Longstanding Bright-Line Rule Protecting Witness Statements from Disclosure

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As the calendar year ends, so does National Labor Relations Board Member Brian Hayes' term, prompting a series of decisions, including *Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012). There the Board reversed 34 year-old precedent exempting witness statements gathered from an employer's internal investigation from disclosure to unions under Section 8(a)(5) of the National Labor Relations Act ("the Act"). In *Piedmont Gardens*, the Board determined that, going forward only, employers must apply a balancing test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), when arguing that there is a confidentiality interest in protecting witness statements from disclosure. In so holding, the Board overruled *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), which had created a "bright-line" rule exempting witness statements obtained by employers during investigations from the general obligation to honor union requests for information.

The issue presented to the Board in *Piedmont Gardens* was whether the employer violated Sections 8(a)(1) and 8(a)(5) of the Act when it refused to provide the union with witness names, witness job titles, and witness statements in response to a request for information. The union requested the information in connection with a grievance filed after an employee was terminated for sleeping on the job. Three co-workers provided the employer with written statements. Two of those co-workers were expressly promised confidentiality in connection with their participation in the investigation. The administrative law judge ("ALJ") determined that the employer violated the Act by refusing to provide the union with witness names and related job titles, but did not violate the Act by refusing to produce the witness statements, given the clear rule in *Anheuser-Busch* shielding such statements from disclosure.

The Board agreed with the ALJ that the employer violated the Act by refusing to furnish witness names and witness job titles. The Board specifically concluded that the employer's general rule to treat such information as confidential did not negate its obligation to provide relevant information to the union. With respect to the witness statements, the Board determined that they are not fundamentally different from other types of investigatory information, and that the *Anheuser-Busch* blanket rule exempting witness statements from disclosure, no matter the circumstances, was unwarranted. Instead, the Board held that the appropriate standard applicable to the disclosure of witness statements is the balancing test set forth in *Detroit Edison*.

Thus, going forward, employers can no longer simply refuse to produce witness statements. Rather, employers must conduct an analysis when responding to a union's request for statements. If the witness statements are relevant to the issue at hand, the employer must evaluate whether there is a "legitimate and substantial confidentiality interest" and, if so, whether that interest outweighs the union's need for the information. In addition, the employer must "raise its confidentiality concerns in a timely manner and seek an accommodation from the other party." Whether the statements are sensitive or confidential in nature, such that they do not need to be disclosed by the employer, will be determined based upon the specific facts of each case.

To support its reversal of long-standing precedent, the Board explained that *Anheuser Busch* predated the Supreme Court's *Detroit Edison* decision, so the Board did not have the opportunity at that time to decide whether the Supreme Court's balancing test for protecting confidential information was sufficient for protecting witness statements. The Board specifically recognized the inherent risks associated with the production of witness statements, including intimidation or harassment of witnesses, retaliation against individuals who provide statements, and reluctance by witnesses to provide statements for fear of disclosure. However, the Board reiterated that the *Detroit Edison* balancing test is designed to address confidentiality concerns, and that there is no basis to assume that all statements have such issues shielding them from disclosure.

Acknowledging the import of its about-face decision, the Board determined that the new disclosure standard is effective prospectively, and cannot be applied retroactively. Thus, under the former *Anheuser Busch* standard, the Board agreed with the ALJ that the employer properly refused to disclose the two statements provided by witnesses who had been promised confidentiality. However, the Board disagreed with the ALJ as to the third witness statement and found that the employer should have provided it to the union because the witness had not been assured confidentiality. That conclusion is consistent with the Board's decision issued the previous day in *Hawaii Tribune-Herald*, 359 NLRB No. 39 (Dec. 14, 2012), holding that a witness statement should have been produced to the union absent an assurance to the witness that the statement would remain confidential.

In light of the *Piedmont Gardens* decision, employers should consider the following:

- Employers can no longer give blanket promises to witnesses that their written statements will remain absolutely confidential, which may dissuade individuals from cooperating in investigations.
- It will be more difficult to protect witnesses from intimidation, harassment and retaliation given that their statements may ultimately be produced to the union.
- Unions are likely to ask for witness statements in most cases given the new *Piedmont Gardens* disclosure standard. If employers wish to avoid providing such statements, they will have to articulate specific reasons for refusing to disclose. For example, in some instances an enhanced likelihood for retaliation against the witness may be relevant. In other circumstances, unusually awkward or private information in a witness statement may create a justification.
- Employers also should realize the practical problems of refusing to disclose witness statements based on even the above types of unusual circumstances. First, given the union-leaning nature of the current NLRB, future Board decisions in this area are likely to erode protections against witness statement disclosures even further (one can easily see the Board concluding that specific situations of enhanced harassment are insufficient under the balancing test). In addition, the employer's duty to "seek accommodation" from the union in instances where the employer wants to limit disclosure creates an additional burden on the employer. Aggressive unions may well choose not to agree to any suggested accommodations (such as selective redacting of information in the statement or limits on who in the union can receive or review a witness statement), again leaving the resolution of such issues to the current NLRB.
- In light of these difficult obstacles, employers may wish to consider options beyond the normal witness statement. In some instances, especially where related litigation has been filed or is threatened, attorney work product protections may exist, although it is not clear that the NLRB would recognize that defense. In other instances, the employer may choose to actually forego a formal witness statement, although that obviously has potential negative ramifications if the witness later changes his or her mind (due to union or coworker pressure or otherwise) about what he or she witnessed.

- Given the problems noted above, it is recommended that employers talk to experienced legal counsel about their options and educate internal investigators about this new legal development.

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