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Employers No Longer Have a Pre-Contract Duty to Bargain Over Disciplinary Decisions

Alert

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By Matt Tews and Anne Marie Buethe

Recently, the National Labor Relations Board (NLRB), overruling an important Obama-era decision, held that employers do not have a pre first-contract duty to bargain before disciplining employees in a manner consistent with an existing policy or practice. The Board's *Care One at New Milford* unanimously overruled *Total Security Management Illinois 1, LLC*, and will be applied retroactively to all cases pending before the NLRB.

In *Care One*, an employer suspended three employees and discharged another pursuant to its disciplinary policy. The employees were newly union-represented, but not yet covered by a collective bargaining agreement (CBA). The employer did not provide the union with prior notice or an opportunity to bargain. The union brought an unfair labor practice charge claiming that the employer violated the *Total Security* rule. The Board's 2016 *Total Security* decision had held that an employer must provide a newly certified union with notice and an opportunity to bargain before imposing serious discipline (i.e., suspension, demotion, discharge), during the time after the union was certified but before the parties had entered a first CBA if the imposition of such discipline involved any discretion.

The *Care One* Board determined that *Total Security* misconstrued an employers' duty to bargain. Under longstanding U.S. Supreme Court precedent, employers may not implement a material change in their unionized employees' terms or conditions of employment on a mandatory subject of bargaining unless the employer provides the union notice and an opportunity to bargain. However, newly unionized employers generally may (or must) continue to act consistent with their past practice prior to entering a first CBA. The *Care One* Board determined that *Total Security*'s holding was at odds with this general rule, giving rise to "a contorted bargaining scheme at odds with traditional bargaining practices," and "shredded longstanding principles governing the duty to bargain."

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In returning to a more traditional view of the duty to bargain, the *Care One* Board noted that the fact that an employer's disciplinary policy or practice contains a certain level of discretion does not alone invalidate the practice or policy. Rather, the Board held that "the correct analysis . . . must focus on whether an employer's individual disciplinary action is *similar in kind and degree to what the employer did in the past* within the structure of established policy or practice. . . . [A]n employer must continue to make decisions materially consistent with its established policy or practice, including its use of discretion, after the certification or recognition of a union. To do otherwise would constitute a change from its preexisting policy or practice, prohibited by" the Supreme Court (emphasis added).

A Proactive Approach to Positive Employee Relations

In overturning *Total Security*, the NLRB "restore[d] the state of the law governing pre-discipline bargaining to what it was during th[e] long period of experience under the [NLRA] and from which *Total Security* impermissibly diverged." While this may come as welcome news to employers, *Total Security*'s precedent was not yet four years old, demonstrating how quickly tides can turn in labor law. It is crucial that employers, unionized and non-unionized alike, remain apprised of the ever-changing labor law landscape and take a proactive approach to maximizing positive labor relations.

For more information on the overturned decision, please contact Joel Abrahamson, Anne Marie Buethe, Dominic Cecere, Nicole Faulkner, Kyle Malone, Richard Pins, Joe Santucci, Matthew Tews, Johnny Wang or the Stinson LLP contact with whom you regularly work.

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