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Seventh Circuit Reminds Employers: The NLRB Has Say in Settlement Issues

Employers were reminded recently that it might not be wise to exclude the National Labor Relations Board (NLRB) from negotiations when settling an unfair labor practice charge under the National Labor Relations Act.

In a recent case on appeal in the United States Court of Appeals for the Seventh Circuit, a union filed an unfair labor practice charge on behalf of two employees against Beverly California Corporation ("Beverly"). Simultaneously, the employees brought civil rights charges before the Indiana Civil Rights Commission. After investigation of the unfair labor practice charge, the NLRB's General Counsel issued a complaint and an Administrative Law Judge (ALJ) was assigned to hear the case. Meanwhile, Beverly and the employees agreed to settle the unfair labor practice charge and the civil rights claim. Beverly paid the agreed upon settlement amount and offered reinstatement to the employees (which they both rejected). Neither Beverly nor the employees' attorneys sought the approval of the NLRB attorneys handling the case or the employees' union. When the NLRB attorneys found out about the settlement, they opposed it. Based upon these circumstances and the facts of this case, the ALJ who was assigned to hear the complaint refused to honor the parties' settlement agreement, largely because the employees' union and the NLRB's General Counsel opposed the settlement terms.

Based on its long-standing policy, the NLRB adopted the ALJ's refusal to honor the parties' private settlement agreement. The Seventh Circuit upheld this result, stating, "The NLRB is not statutorily obligated to honor settlement agreements." *Beverly California Corp. v. NLRB*, Nos. 99-4121 & 00-3881 (7th Cir. June 8, 2001). Instead, the NLRB has discretion to uphold a settlement unless it "is at odds with the [NLRA] or . . . with the [NLRB's] policies." The NLRB bases this decision on the four-factored test set forth in its decision in *Independent Stave Co., Inc.*, 287 NLRB 740, 741 (1987). The NLRB considers all circumstances about the settlement, including these factors:

1. Whether the charging parties, the employers and/or the individual employees have agreed to be bound by the settlement terms, and whether the General Counsel agrees with the settlement terms;

2. Whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation and the stage of the litigation;

3. Whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and

4. Whether the employer has engaged in a history of violations of the NLRA or has breached previous settlement agreements resolving unfair labor practice disputes.

Practical Tips

Employers must be aware that they have no absolute right to settle an NLRB charge without the NLRB's consent, even if the employees, their attorneys and the company have agreed to terms. Once a charge is filed, the NLRB has a role in determining whether settlement is in the interest of the NLRA and the NLRB's policies. Accordingly, as the employer learned in this case, any attempt to exclude the government in these circumstances can lead to additional litigation expenses. Employers should consider the following issues when negotiating with employees, their attorneys or the NLRB attorneys:

- Was the unfair labor practice charge brought by individual employees or their union—and if by the latter, does the union support the proposed settlement?
- Will the NLRB General Counsel support the proposed settlement?
- Is the proposed settlement likely to be considered to be in accord with the purposes of the NLRA?
- If necessary, will you be able to prove that the employees were not coerced into accepting the agreement?
- Has the employer been the subject of prior unfair labor practice charges? Were any charges similar to the ones at issue? If an employer has a record of violating the NLRA and settling before any ultimate decisions are reached, the NLRB may take this into account.

Some of the NLRB's *Independent Stave* factors may be difficult for employers to interpret. Whether a settlement proposal is reasonable in light of the "nature of the violations" and the "stage of the litigation" is a judgment call based upon experience. If the NLRB seems to be unreasonably refusing to approve an agreed settlement proposal, other strategies may better suit the employer than fighting over the settlement issue. For example, making offers of unconditional reinstatement to discharged employees may be useful to cut off back-pay damages even if the NLRB will not allow withdrawal of an unfair labor practice charge.

If you have questions about strategy when faced with resolving an unfair labor practice charge, call Michael Sullivan, Partner in the Labor and Employment Group at Goldberg, Kohn, Bell, Black, Rosenbloom & Mortiz, Ltd. at 312 201-3963, or e-mail him at Michael.Sullivan@goldbergkohn.com.

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