

## Labor and Employment Alert

### NLRB Overturns Longstanding Precedent in Granting Unions Greater Access to Witness Statements

January 7, 2013

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On December 15, 2012, the National Labor Relations Board issued a decision that overturned longstanding precedent providing employers with a right to withhold witness statements from a union that requests information relevant to a grievance. See *American Baptist Homes of the West*, 359 N.L.R.B. No. 46 (Dec. 15, 2012).<sup>1</sup> The Board replaced the bright-line rule protecting witness statements from disclosure, first announced in *Anheuser-Busch, Inc.*, 237 N.L.R.B. 982 (1978), with a balancing test that weighs an employer's interest in maintaining witness confidentiality against the union's need for relevant information.

An employer has a general obligation under Section 8(a)(5) of the National Labor Relations Act to provide, upon a union's request, information relevant to the union's representation of an employee. See *N.L.R.B. v. Acme Indus. Co.*, 385 U.S. 432 (1967). In *Anheuser-Busch*, the Board concluded that witness statements "are fundamentally different" from other types of information that an employer has an obligation to provide. The Board noted that "the premature release of witness statements risked employer and union intimidation of potential witnesses, as well as the possibility that witnesses might be reluctant to give statements at all absent assurances against prehearing disclosure." *Am. Baptist Homes*, slip op. at 3. The Board carved a bright-line exception for disclosure of witness statements taken pursuant to an internal investigation into alleged employee misconduct.

The Board overturned this rule in *American Baptist Homes*. The Board rejected the premise that witness statements are fundamentally different from other information that a union might seek in performing its representational duties. Instead, the Board held that, in the context of a potential grievance, the substance of a witness's statement should enjoy no greater protection than, for example, the witness's name. Whether an employer must disclose witness statements now must be determined by a balancing test. The test "requires that if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party's need for the information." *American Baptist Homes*, slip op. at 4. The employer must raise any confidentiality concerns regarding such statements "in a timely manner" and must seek an accommodation from the union. The employer must have a factual basis for asserting a confidentiality concern with respect to a particular statement. A general policy of keeping witness statements confidential will not by itself satisfy the test. The Board suggested that "legitimate and substantial concerns of confidentiality or retaliation" may "in some cases" justify an employer's refusal to disclose a witness statement. *Id.*

The Board will not apply the new standard retroactively. In cases where an employer's refusal to provide requested witness statements occurred prior the issuance of the new decision, the employer's conduct will remain protected by the

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<sup>1</sup> Board Member Sharon Block took part in this decision. Ms. Block joined the Board following a recess appointment by President Obama in January 2012. On December 5, 2012, the District of Columbia Circuit Court of Appeals heard oral arguments in a lawsuit challenging the constitutionality of the recess appointments. See *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir.) (awaiting decision). If the D.C. Circuit holds the appointments to be unconstitutional, the court may vacate *American Baptist Homes*.



bright-line exemption rule. Conversely, all witness statements taken by employers going forward will be subject to the balancing test.

Member Hayes dissented, arguing that the bright-line rule protected witnesses from union and co-worker coercion and intimidation and facilitated effective internal investigations. By contrast, Hayes contended, the Board's new standard will chill witness participation in investigations and will generate unnecessary and time-consuming litigation concerning the confidentiality of witness statements.

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