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LABOR & EMPLOYMENT

ALERT

NATIONAL LABOR RELATIONS BOARD OVERRULES 20-YEAR-OLD CASE CONCERNING UNLAWFUL SOLICITATION

By Charles O. Zuver, Jr.

On July 2, 2013, the National Labor Relations Board (the Board) affirmed an administrative law judge's (ALJ's) finding that the employer, Albertson's LLC (Albertson's), unlawfully solicited grievances and implicitly promised to remedy them when its labor relations director met with an employee in an employee breakroom during a union organizing campaign, informed the employee that it was open season for health insurance enrollment and asked if the employee had any questions about the insurance or any other concerns. The employee did not respond to the questions. See *Albertson's LLC*, 359 NLRB No. 147 (2013).

Albertson's excepted to the ALJ's finding, arguing that there was no unlawful solicitation because the employee did not respond to the labor director's query about workplace concerns by voicing a complaint, citing *William T. Burnett & Co.*, 273 NLRB 1084 (1984). The Board rejected Albertson's assertion and held that it was overruling *Burnett* to the extent *Burnett* holds that the solicitation of grievances cannot be found unlawful if the solicited employee fails to raise a grievance in response to the solicitation.

The Board's overruling of *Burnett* is not particularly troubling because the *Burnett* Board simply adopted the ALJ's finding that the employer did not unlawfully solicit and promise to remedy grievances. Concededly, the ALJ found that the absence of the response itself revealed that the employees did not believe that the employer's remarks implied that any complaints would be remedied. However, the ALJ also relied on the fact that there was no evidence indicating or suggesting the employer would act on any grievance or problem raised by employees, and further there was no specific promises of any benefits that would tend to carry with them the unlawful implication of remedial action. Thus, the *Burnett* Board really appears to have applied a totality of the circumstances approach.

What is more troubling is that the Board concluded that Albertson's violated the Act by promising to remedy the grievance based solely on the fact that the alleged solicitation occurred during a union organizing drive and Albertson's had not had a past practice of soliciting grievances in one-on-one meetings with employees. The Board presumed that the solicitation carried with it a promise to remedy the grievance absent any evidence to support this. The labor relations director said nothing about whether he would address the concerns or remedy the grievance, nor did the director specifically refer to the granting of any benefit. Moreover, the meeting was specifically intended to address questions regarding enrolling in the existing health insurance and Albertson's had a practice of encouraging employees to contact them about these issues through a hotline. Thus, the current Board is effectively re-writing Board law to find that during an organizing drive, solicitation of grievances or concerns alone is unlawful absent the employer demonstrating it has a past practice of soliciting grievances in the exact same manner.

The Board also found that Albertson's violated Section 8(a)(1) of the Act by failing to notify an employee of his rights under *Johnnie's Poultry* in connection with Albertson's investigation of unfair labor practice charges leveled against it. Under *Johnnie's Poultry*, an employer must (1) notify an employee before the investigatory interview begins, (2) assure the employee that no reprisals will take place for refusing to answer any questions or for the substance of an answer given, and (3) obtain the employee's participation in the interview on a voluntary basis. The Board called this a "bright-line" rule, perhaps indicating going forward that the failure to provide the notice in each and every interview violates the Act. However, the Board found the violation in the instant case because (1) Albertson's failed to apprise the employee of these rights after being re-questioned some three months after being initially apprised of these rights, (2) the subsequent interviewer was a different attorney than the two used in prior

lawful interrogations, and (3) the subject matter of the interview was different.

Key Take Aways:

For unorganized employers not currently in the midst of an organizing drive, now is the time to create an open door policy at your business to encourage employee complaints. If a union attempts to organize your facility thereafter, you can remind employees of that open door policy and encourage them to use it. The key is not to depart from your previously established mechanisms to solicit grievances. Additionally, you should not promise to remedy any grievance unless doing so is consistent with that past practice. The Board will presume a violation if you depart from that past practice.

Given the Board's comments about the *Johnnie's Poultry* notice being a "bright line" rule, employers should always remember to read non-supervisory employees their rights under *Johnnie's Poultry* every time they question employees in connection with unfair labor practice charges.

For more information on this Alert, please contact Charles O. Zuver, Jr. at 310.228.6997 or czuver@foxrothschild.com, or any member of Fox Rothschild's Labor and Employment Department.

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