Proskauer

NLRB: Employer Did Not Unlawfully Discontinue Christmas Bonus

Labor Relations Update on **August 19, 2019**

Summer is winding down but the NLRB continues to be a source of vigorous activity. The Board recently issued a sweeping decision regarding the lawfulness of arbitration agreements. Also, the Board announced its intention to change the so-called ambush election rules. Of course, the Board continues to issue decisions on a regular basis. Discussion of some of the Board's recent decisions can be found, here, here and here. September 30 is the final day of the Board's fiscal year and so one can expect an uptick in the issuance of decisions in the coming weeks.

Earlier this summer the Board issued a decision related to a union's challenge to an employer's discontinuance of a Christmas bonus. The Christmas bonus case is such a staple of labor law that most practitioners will encounter a similar issue in the course of their careers. The basic premise is simple: In a unionized environment, the employer has in the past offered some kind of bonus for the holidays, it could be cash or it also could be in the form of a free turkey or ham. When this bonus is not offered one year, the union files a charge alleging a unilateral change of a term or condition of employment. We have covered this type of case in a prior post.

In Bob's Tire Co., Inc. 368 NLRB No. 33 (July 31, 2019), the Board was faced with a situation where in the context of other more serious unfair labor practices, the employer did not pay a Christmas bonus. The evidence in the record consisted of the testimony of a former employee who testified that he had received a cash Christmas bonus in amounts varying between $20 and $100 every year from 2008 to 2014. In 2015 the employer did not pay any bonus. The failure to pay the bonus was alleged to be a violation of Section 8(a)(5) because the employer did not notify the union of the discontinuance of the bonus or offer to bargain.

The Administrative Law Judge found a violation of the Act, stating the "bonus was paid with sufficient regularity that employees that employees would have been justified in expecting to receive such a bonus as part of their wages."

On appeal, a unanimous panel of the Board (Chairman Ring and Members McFerran and Kaplan) reversed this finding. The Board noted that the analysis of whether such a bonus is actually a term or condition of employment that must be bargained over before it can be changed relies on two factors. First, the regularity of the bonus. Second, whether the "bonus was tied in any way to employment -related factors." This would include measurable metrics. The Board held that while there was evidence of regularity, there was no proof that the amount of the bonus was tied to any particular factor or factors. The Board concluded that under the circumstances no violation occurred.

While hardly a major decision, it does provide another illustration that the current Board continues to look very carefully at the quality of proof provided to support a claim, and will require specific evidence to support particular allegations.

View Original

Related Professionals

- **Mark Theodore**
  Partner