

Total Security Recall: Recent Decision May Lead to Reinstatement of Bargaining Requirement for Discipline Pre-CBA

Labor Relations Update on August 2, 2023

A recent Administrative Law Judge ruling in [Starbucks Corp.](#) sets up a possibility for the National Labor Relations Board to reinstate an employer's obligation to bargain with a union before imposing serious discretionary discipline in a newly-organized workplace before a first contract is agreed to—even when the discipline is consistent with the company's established disciplinary policy or practice.

Current Board Law

In 2016, the Board ruled in [Total Security Management Illinois 1, LLC](#), 364 NLRB 1532 (2016), that employers have the obligation to bargain before imposing serious discretionary discipline on an employee in an organized workplace that has not yet reached a first contract.

This requirement did not last long. Just four years later, in 2020, the Board overturned *Total Security* in [Care One at New Milford](#), 369 NLRB No. 109 (2020). In a unanimous opinion, the Board held that the employer was permitted to unilaterally discipline employees before a first contract has been reached pursuant to its existing disciplinary policy.

The stage is now set for the Board to overturn *Care One* and return to *Total Security*.

ALJ Decision

In *Starbucks Corp.*, the ALJ ruled that an employee in New York was fired for union activities, agreeing with the NLRB General Counsel that the company's actions violated Section 8(a)(3) of the Act.

However, the ALJ also found that the employer did not violate Section 8(a)(5) of the Act when it failed to either bargain with or provide requested information to the union regarding the employee's termination. The store was newly-organized at the time of the employee's discharge, and the parties had not yet entered into an initial collective bargaining agreement. Therefore, the ALJ applied the standard set forth in *Care One* applied, and the employer was not required to bargain over the decision to discharge the employee.

The NLRB General Counsel argued that this set of facts presents an opportunity to overturn *Care One* and revert to *Total Security*, and urged the ALJ to do so. While ALJs are bound to apply Board precedent, the General Counsel may appeal this decision to the full Board, which has shown an inclination to return to [pre-2017](#) standards.

Takeaways

If the Board accepts the case and returns to the *Total Security* standard, employers will need to bargain with a newly-certified union prior to imposing serious discretionary discipline with respect to its employees during the pre-contract hiatus period. This requirement applies even if the discipline is consistent with the employer's past practice regarding imposing discipline.

We will continue to monitor this issue for any developments.

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