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## Dealing With a Divided Workforce: NLRB Clarifies Standard for Treating Union and Nonunion Workers Differently

By Hugh F. Murray, III and Peter D. Stergios

Under the National Labor Relations Act (NLRA), groups of employees are allowed to determine whether they wish to be represented by a union for purposes of collective bargaining, which sometimes results in businesses having both union and nonunion employees. How an employer treats its nonunion workforce in relation to its union workforce can impact employee morale and raise some significant legal issues. In the recent case of *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122 (May 7, 2019), the National Labor Relations Board (NLRB) clarified and reaffirmed that for the most part, employers are free to treat union and nonunion workforces differently as long as the employer does not have an improper anti-union motive in doing so.

At issue was an impromptu decision by pharmaceutical company Merck to give employees an extra paid holiday on the Friday before Labor Day 2015 as an "appreciation day" for the company's success. When Merck announced the extra day off five weeks in advance, the company noted that it applied to all company employees *except for* "those in the U.S. who are covered by a collective bargaining agreement." Therefore, about 20,000 nonunion U.S. employees were given September 4, 2015, as a paid day off from work, while 2,700 employees represented by three different unions were expected to report to work as usual that day.

The unions filed charges with the NLRB. The unions alleged that the company violated the NLRA by denying the union employees the extra paid day off. After a trial, an administrative law judge (ALJ) agreed with the unions and ordered the company to pay each union employee a day's pay. However, a divided NLRB reversed the ALJ's decision, holding that the company did nothing wrong.

The board members all agreed on the basic legal requirements. The NLRA provides that employers may not "interfere with, restrain, or coerce" employees in the exercise of their rights under the NLRA, including the right to unionize. Employers may treat represented and unrepresented employees differently "absent an unlawful motive." To determine whether an employer had an "unlawful motive," the NLRB must show (1) protected activity, (2) the employer's knowledge of the protected activity, and (3) the employer's "anti-union animus."

The employer in this case gave two related justifications for not granting the paid day off to the unionized employees. First, Merck maintained that it would be unlawful to simply unilaterally grant the paid day off without bargaining with the unions. Second, Merck did not want to bargain with the unions during the life of the collective bargaining agreement because when it had in the recent past requested certain midterm modifications of the contract, the unions had declined to agree. The ALJ and a dissenting board member concluded from these stated justifications that the company had therefore conceded an unlawful motive by relying on the unions' lawful past refusal to change terms of a collective bargaining agreement in the middle of its term.

The majority of the NLRB, however, held the employer's action lawful because nothing in the NLRA requires negotiation over mid-contract changes, and in view of the parties' negotiation history, Merck's unilateral withholding of the benefit from its unionized employees was a "rational business decision" given the dynamics of the negotiation process.

In dismissing the complaint, the majority said, "In sum, we find that [Merck's] decision not to grant represented employees the paid holiday was simply a reflection of the 'competing forces and counteracting pressures' that were a part of the historical collective-bargaining relationship."

While this is a good result for the employer, it took almost four years of litigation to obtain the result. Moreover, because the decision does not establish a new legal rule but purports to merely apply an established rule, the next employer in a similar situation may get a different result. Employers with a workforce consisting of represented and unrepresented employees should carefully consider the ways in which they treat the two workforces differently and be very deliberate about how they explain such differences when challenged.

If an employer decides to grant a benefit to nonunion employees but not to propose granting it to union employees, the employer should have a clear reason for that decision that cannot be characterized as simply "anti-union." As is often the case, some advance planning can reduce the risk of the years of litigation, expense, and disruption of labor relations experienced in this case.

If you have any questions about this topic, please contact the authors, a member of the Labor & Employment Practice Group, or your lawyer at McCarter & English, LLP.

Hugh F. Murray III
860.275.6753
hmurray@mccarter.com

Peter D. Stergios
212.609.6848
pstergios@mccarter.com