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NLRB Rules That Witness Statements Must Be Provided to Unions

For the past 35 years, the National Labor Relations Board (NLRB) has held that employers have no obligation to provide unions with employee witness statements obtained during investigations into employee misconduct. In its 1978 *Anheuser-Busch, Inc.*, decision, the NLRB found that disclosure of employee witness statements to a union could lead to coercion or intimidation of employees in an effort to change their testimony or to keep them from testifying at all, as well as result in a reluctance by employees to provide statements in the first place.

Despite this long-standing precedent, an increasingly activist NLRB recently overruled this decision in *American Baptist Homes of the West d/b/a Piedmont Gardens*, based on nothing more than its belief that the rationale of *Anheuser-Busch* was flawed. Applying its new interpretation of a decades-old precedent, the NLRB held that employee witness statements must be provided to unions unless an employer can establish a legitimate and substantial confidentiality interest in protecting employee witness statements from disclosure. The burden is on the employer not only to prove a legitimate and substantial confidentiality interest but also to seek an accommodation with the union to protect its confidentiality interest.

In light of the NLRB's decision, employers can expect to be inundated by union requests for employee witness statements. Depending on the facts and circumstances of each case, employers may be able to establish legitimate and substantial confidentiality interests but can no longer rely on the NLRB's blanket exclusion for employee witness statements. Examples of confidentiality interests may include reports or documented instances of witness coercion or intimidation, an underlying issue with a confidential informant involved in serious misconduct, or statements made in preparation for litigation. Even then, an employer would still be required to discuss with the union possible accommodations to protect the confidentiality interests. Future NLRB decisions are likely to define the contours of legitimate confidentiality interests and acceptable accommodations.

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