

# NLRB Restores Employer's Right to Discipline and Discharge Employees During Initial Labor Contract Bargaining

Jun 25 2020

Practice Area: Labor and Employment

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Under the National Labor Relations Act, ("NLRA"), employers whose employees are represented by a union are required to bargain with the union before changing terms and conditions of employment, including disciplinary policies and procedures. Thus, an employer's failure to bargain with a union before changing workplace conditions may violate the NLRA.

When a union is newly certified, an employer must maintain the workplace status quo while negotiations for an initial union contract proceed. Under longstanding National Labor Relations Board ("NLRB") case law, if an employer needed to discipline an employee while bargaining for its first contract, the employer was free to issue discipline consistent with its existing disciplinary policies and practices without first bargaining with the union. In 2016, the NLRB modified the original standard for maintaining the status quo for discipline during initial contract bargaining. *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). In *Total Security Management*, the NLRB held that employers must first provide notice and an opportunity to bargain over serious discipline if the decision involved use of employer discretion.

In June 2020, however, the NLRB invalidated the *Total Security Management* standard and restored the original standard for employers issuing discipline while negotiating their first union contract. *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109 (June 23, 2020).

## **Discipline and Discharge During First Contract Bargaining Permissible Where Consistent with Existing Policies**

The employer, 800 River Road Operating Company ("800 River Road"), maintained a discretionary disciplinary policy. This policy allowed 800 River Road to impose an appropriate level of discipline at any stage of the disciplinary process for inappropriate behavior, conduct or performance. During initial contract bargaining, 800 River Road suspended certain employees and discharged another, pursuant to its disciplinary policy, without first notifying and bargaining with the union.

After the union filed a charge, the Administrative Law Judge (“ALJ”) found that 800 River Road violated the NLRA by failing to engage in pre-discipline bargaining with the union over the suspensions and discharge. The NLRB reversed the ALJ’s decision and overruled *Total Security Management* on the grounds that it conflicted with prior NLRB and Supreme Court precedent, and imposed a “complicated and burdensome bargaining scheme” on employers. Therefore, the NLRB dismissed the complaint because the employer was following its existing disciplinary policies and practices in issuing the suspensions and discharge.

### **What This Decision Means for Employers**

*800 River Road* applies retroactively to all pending cases, so employers facing any pending or threatened unfair labor practice charges should consult with experienced labor counsel to determine how the decision will affect their rights. Moreover, employers bargaining for a first contract with a union should:

- Continue to maintain the status quo for all terms and conditions of employment;
- Discipline and discharge employees consistent with their existing disciplinary policies and practices;
- Keep accurate records of disciplines and discharges; and
- Decline union requests to engaging in pre-discipline bargaining.

During labor contract negotiations, employers are also required to maintain the status quo regarding other terms and conditions of employment — not just discipline — even where such subjects involve the use of employer discretion, such as health benefits, wages increases, and annual bonuses. Application of the NLRB’s rules can be nuanced and highly fact-specific. Employers facing union organizing should consult with experienced labor counsel to protect their rights and avoid liability for potential unfair labor practice charges.

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