CLIENT ALERT: NLRB Changes Deferral Rules – And Doubles Employer Exposure

Summary: On December 15, 2014, the National Labor Relations Board ("NLRB") overturned 30 years of its own established precedent regarding when it will defer to an arbitrator's award. The result is that a union may now take an employer to both arbitration and the NLRB over the exact same issue, either at the same time or separately. To avoid this, an employer needs a provision in its contract saying that arbitrators are empowered to decide National Labor Relations Act ("NLRA") claims as well as contractual disputes, and needs to make sure the arbitrator actually analyzes and decides the NLRA claims. Arbitration will become more involved, technical, and costly.

Background: For the past three decades, the NLRB's rule was that if a union wished to challenge an employer action, and the dispute was one that could properly be heard by an arbitrator, then that is where it should be resolved – in arbitration. The Board only reserved the right to review a resulting arbitration award to make sure it was not "repugnant to the purposes" of the National Labor Relations Act. Only a tiny number of arbitration awards were ever found by the Board to be "repugnant" in this way. Essentially, the arbitrator's ruling almost always ended the case, both under the contract and at the NLRB.

Suddenly, the Board has changed the rules. In its *Babcock & Wilcox* decision, the Board decided that unless the parties' contract ***specifically states*** that an arbitrator's resolution of a grievance shall also resolve any potential unfair labor practice charge that could have been filed over the same matter, the union is free to double the litigation by both pursuing the case through arbitration and filing a Charge at the Board. (If the contract does not include this provision, the Board will allow the parties to stipulate to it at arbitration, but employers may have little leverage to obtain that stipulation on a case-by-case basis.)

Traditionally, when a union sought both arbitration and a Board ruling, the employer would ask the Board to "defer" the unfair labor practice case to arbitration, and let an arbitrator resolve the matter for both purposes. The Board would agree, and a single case would go forward – in the less costly,

less formal setting of arbitration. Unless the contract specifically provides for arbitration to also decide unfair labor practice claims, however, the Board will no longer honor such requests for deferral.

In practical terms, this appears to mean among other things that a union can now spare itself the expense of arbitration, file at the NLRB, and have the government pursue the case for it – free of charge to the union – but with the employer having to pay for its own defense.

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