

Labor Board Subpoenas Allowed before OSHA Consultation

February 16, 2016

Practices

Labor Relations
Workplace Safety and Health

A divided National Labor Relations Board (NLRB) has ruled that a memorandum of understanding (MOU) between NLRB and the Occupational Safety and Health Administration over OSHA-related issues does not require NLRB's General Counsel to consult with OSHA before issuing investigative subpoenas.

Representatives of a manufacturing facility in Alabama had petitioned NLRB either to issue protective orders or to revoke subpoenas issued by an NLRB regional director, acting on behalf of the agency's General Counsel, for documents or other items related to two alleged unfair labor practices. The company contended that a 1975 NLRB-OSHA MOU required NLRB to defer action until the agency first conferred with OSHA when the complaints relate to matters associated with OSHA's governing statute (Section 11(c)).

Both OSHA and NLRB have mandates to address employee safety concerns. Section 11(c) of the Occupational Safety and Health Act prohibits firing or discriminating against an employee for exercising rights under the OSH Act. The National Labor Relations Act prohibits retaliation against employees who have engaged in union activity or protected concerted activities related to employees' safety concerns. The purpose of the MOU is to prevent duplicative litigation before the two agencies when complaints involve similar safety issues.

In denying the petition, Board members Kent Y. Hirozawa and Lauren McFerran acknowledged that the MOU calls for deferral or dismissal where a charge filed with the General Counsel and a complaint brought to OSHA both involve Section 11(c) issues. But, they added, "[W]e find that the MOU does not require the Region to determine whether to defer or dismiss such charges, or engage in consultations with the Solicitor of Labor concerning deferral or dismissal, without having investigated the facts and circumstances surrounding the allegations."

The Board's decision indicates that an employer cannot block an NLRB investigation of an alleged unfair labor practice even if the employer correctly surmises the agency will defer action in a dispute to OSHA.

Employers should consult with counsel to determine whether and how their particular controversies may be affected by this decision.

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