

# NLRB Explains When Granting Benefits to Nonunion Employees and Withholding the Same From Union Workers Can Be Lawful

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On May 7, 2019, the National Labor Relations Board issued a decision that will be welcomed by employers desiring to maintain differences in the benefits provided to their union and nonunion employees. In [\*Merck, Sharp & Dohme Corp.\*](#), the Board held that a company's decision to grant nonunion employees an additional paid day off while requiring union employees to work the same day was lawful under the National Labor Relations Act (NLRA). The analysis offered in the majority's opinion may assist employers in understanding how they can comply with the NLRA when granting nonunion employees a benefit while withholding the same benefit from union employees.

## Background

The employer, Merck, Sharp & Dohme Corp., is an international pharmaceutical company with over 67,000 employees worldwide. In the United States, unions represented 2,700 of its 23,000 employees. At the time of the events that gave rise to the dispute, Merck was not actively engaged in bargaining with any unionized unit.

In the spring of 2015, Merck learned that its profits vastly exceeded expectations. To recognize its employees' hard work and contributions to its success, the Merck leadership decided to grant employees an additional paid day off on September 4, 2015. Merck dubbed this additional paid day off "Appreciation Day."

When Merck announced Appreciation Day to employees, it explained that those individuals covered by a collective bargaining agreement (CBA) would not receive the Appreciation Day benefit and would report to work that day as usual. In communications following the announcement, Merck explained that it denied the benefit to union employees because (1) in the past, the unions had rejected Merck's attempts to make midterm contract changes, and (2) it believed that it would violate the NLRA to grant the benefit unilaterally.

Despite union objections, Merck carried out Appreciation Day as initially announced. Merck required

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union employees to report to work on September 4, 2015. Union employees at only two sites received Appreciation Day off. At one of those locations, the CBA granted union members the same benefits as nonunion employees. The second group of unionized employees included Appreciation Day as a negotiated “floating” holiday.

## The Board’s Decision

In a 3–1 decision, the Board held that Merck’s decision to grant the Appreciation Day benefit to nonunion employees and require union employees to work did not violate the NLRA.

Both majority and dissenting opinions found that the Board’s analysis in *Wright Line* should be applied to determine whether Merck acted lawfully. *Wright Line* requires the general counsel prosecuting a charge to demonstrate: “(1) union or protected concerted activity, (2) employer knowledge of that activity, and (3) union animus on the part of the employer.” The crux of the dispute between the majority’s and the dissent’s respective opinions rested on the third element of the *Wright Line* analysis; they disagreed as to whether the distinction drawn by Merck between nonunion and union employees demonstrated animus based on unionized status.

The majority found that neither reason Merck presented for denying the benefit showed union animus. First, the majority explained that Merck’s consideration of past attempts to engage in midterm contract changes was “not unusual in the course of a collective bargaining relationship, nor is it evidence of an employer’s antiunion animus.” The fact that Merck was not actively engaged in bargaining at the time it withheld the Appreciation Day benefit also was not determinative of union hostility. Second, Board precedent supported Merck’s belief that it would violate the NLRA to unilaterally implement the Appreciation Day benefit. Further, the majority reasoned that the Act generally does not require parties to bargain over or accept midterm contract changes. Thus, both of Merck’s reasons to withhold the Appreciation Day benefit from union employees were devoid of union animus, and the General Counsel failed to demonstrate unlawful discrimination under the NLRA.

## Key Takeaways

The *Merck, Sharp & Dohme Corp.* decision confirms the legality of an important flexibility for employers—the ability to provide certain, extra benefits to its nonunionized employees while not offering the same benefits to the union employees. This is an important union avoidance tool for employers that wish to provide benefits to their nonunion employees that are as good or better than those negotiated with a union and reflected in a CBA. Of course, employers have to implement such differing benefits in ways and at times that demonstrate that the differences are not reflective of union animus.

The simple reality is that employees who chose to be represented by a union have chosen to be treated differently than the other, nonunion employees. The represented employees typically prefer to lock in their wages and benefits in the form of a multiyear contract, thus giving them the benefits of security and certainty. One trade-off for that level of security and certainty, however, is that they may not share in extra benefits employers choose to offer to nonunionized employees, who typically have no long-term contractual protections for their wages and benefits. This case reflects that there are indeed trade-offs for unionized employees, who chose a level of certainty and security over flexibility in their wages and benefits.

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