

NLRB Rules Notice and Opportunity to Bargain Over Discipline No Longer Required in New Bargaining Relationships

Article By:

Harry J. Secaras

The National Labor Relations Board (NLRB) recently overturned a 2016 decision holding that an employer violates Sections 8(a)(5) and (1) of the National Labor Relations Act (NLRA) by failing to provide notice and an opportunity to bargain to a newly elected union prior to disciplining unit members. In [*800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109, \(June 23, 2020\)](#), the NLRB, agreeing with the NLRB's general counsel and the employer, overturned [*Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 \(2016\)](#). Hence, the Board overturned the administrative law judge's decision following *Total Security Management* and ruled that the employer did not violate the NLRA when it failed to provide the union with notice and an opportunity for prediscipline bargaining prior to suspending three employees and discharging one employee. The Board further concluded that this decision applies retroactively to all pending cases effectively dismissing all pending matters with similar allegations.

In *Total Security Management*, the NLRB concluded that an employer (with limited exceptions) must provide a new bargaining representative with notice and opportunity to bargain over discretionary elements of an existing disciplinary policy before imposing "serious discipline" on bargaining unit employees not yet subject to the terms of a collective bargaining agreement. The NLRB rejected the rationale articulated in *Total Security Management* that meting out discretionary discipline under an existing policy affects the terms of employment for bargaining unit employees not yet covered by a contract. The Board, returning to pre-*Total Security Management* reasoning, concluded that an employer that exercises discretion consistent with its preexisting disciplinary policy or practice does not violate the NLRA. This decision reverses yet another ruling by the Obama Board that upset long-standing labor principles.

Employers negotiating a first contract with a newly-elected bargaining representative no longer are required to engage in prediscipline bargaining prior to issuing discipline. Employers new to the collective bargaining relationship are relieved of this obligation and can maintain their extant discipline protocols during negotiations for a first contract. Employers, of course, must have a disciplinary procedure in place and must follow that procedure in issuing disciplinary measures. Overruling *Total Security Management* restores long-standing Board precedent allowing employers to enforce their existing disciplinary policy without any prediscipline notice or bargaining requirements while the parties bargain for a first contract.

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