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NLRB Division of Advice on Making Unilateral Changes when Employer and Union are at Negotiations Stalemate

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A unionized employer did not violate the National Labor Relations Act when, after reaching a bargaining impasse with the union, it unilaterally issued a health care proposal that gave it broad discretion to make unilateral changes to certain parts of the health care plan. According to a Memorandum issued by the National Labor Relations Board's Division of Advice, the move did not come within the *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), exception to the NLRB's rule prohibiting employers from unilaterally implementing, after reaching impasse, proposals that give the employer broad discretionary powers. Here, after implementing the new plan, the employer agreed not to make any changes or to exercise any discretion it had under the plan without first bargaining with the union. *Columbia Sussex Corp. d/b/a Anchorage Hilton*, Case 19-CA-127945 (dated Dec. 19, 2014, issued on Jan. 30, 2015).

Sometimes parties in collective bargaining reach "impasse" – a stalemate in negotiations. When that occurs, an employer has the legal right to implement its pre-impasse proposals, as long as they do not give the employer broad discretionary powers to unilaterally change employee pay.
The McClatchy exception has been expanded to include other mandatory subjects of bargaining, such as health insurance.

In Anchorage Hilton, when the parties reached impasse, the employer told the union it was going to implement the following health care proposal in approximately six weeks:

> Employees covered by this Agreement shall participate in the Columbia Sussex Group Health Plan in accordance with the provisions of such plan, subject to any modifications or changes applicable to other participating employees that may be adopted by the Plan Administrator. . . . (Emphasis added.)

Columbia Sussex Management, whose officers were substantially the same as the employer's, administered the plan. The plan documents also gave the plan administrator broad discretionary authority:

The Plan Administrator shall perform its duties as the Plan Administrator and in its sole discretion, shall determine appropriate courses of action in light of the reason and purpose for which the Plan is established and maintained. In particular, the Plan Administrator shall have full and sole discretionary authority to interpret all plan documents, including this SPD, and make all interpretive and factual determinations as to whether any individual is entitled to receive any benefit under the terms of this Plan. Any construction of the terms of any plan document and any determination of fact adopted by the Plan Administrator shall be final and legally binding on all parties . . . . (Emphasis added.)

However, the employer also told the union that it would not make any unilateral changes to the plan without first giving the union an opportunity to bargain. Indeed, the employer did not make any changes to the plan, or exercise any discretion reserved to it under the plan, since its implementation.

The Division said the "mere announcement" of the changes is not a violation of the NLRA; rather, it is the implementation of the changes that may trigger a violation.

For union-free employers, this decision shows how having a union can interfere with a company's ability to implement changes, including those that are critical to the long-term viability of the business. For unionized employers, it underscores the importance of carefully planning for bargaining, particularly where discretionary proposals granting the employer broad discretion are involved.

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