

NLRB Expands Unions' Ability To Acquire Information To Investigate Discrimination Complaints

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On April 13, 2018, the NLRB found that an employer was required to provide a union with individual contracts that were not contemplated under the relevant collective bargaining agreement (CBA) in order for the union to review the contracts and investigate complaints of gender discrimination. The principal flutist in the Colorado Symphony Association informed the union that she believed she was being paid less than her male counterparts. At that time, the flutist was in the process of negotiating her individual contract with the Symphony, which the union had no involvement with. The relevant CBA authorized the Symphony to negotiate and enter into individual agreements with the performers without union participation and the union had never raised any issue regarding the agreements during any previous CBA negotiations. The CBA itself also did not contain a provision mandating compliance with federal or state discrimination laws, and therefore the flutist had no recourse to file a grievance under the CBA for discrimination. Nonetheless, the union requested copies from the Symphony of all individual contracts between the performers and the Symphony. A few days after that request, the flutist filed a charge with the EEOC. The NLRB unanimously upheld the ALJ's decision. Preliminarily, the ALJ found that, even absent an anti-discrimination clause in the CBA, "investigating possible employer race or sex discrimination is a legitimate purpose related to a union's collective-bargaining duties and responsibilities." Since the union and the Symphony were in negotiations over the CBA, the union could have reviewed the individual agreements to determine whether it was necessary to propose an anti-discrimination policy or other provision for inclusion in the CBA. Aside from the implications on the negotiations, the ALJ also asserted that investigation of sex discrimination is a well-established mandatory bargaining subject. The union, therefore, may be "entitled to information that is relevant and necessary to determining whether a particular employment action is discriminatory," regardless of whether the employment action was subject to mandatory bargaining. The NLRB's position in this matter requires some consideration of the extent the NLRB will allow unions to go to protect female members from sex discrimination in the era of the "Me Too" movement. The *Colorado Symphony Association decision* provides at least some indication that the NLRB may continue to allow unions to request information regarding non-mandatory subjects in order to investigate potential discrimination.

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