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Some Hope For Employers? Limits On Alan Ritchey Discretionary Discipline Bargaining Obligation Applied By NLRB

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In *Alan Ritchey*, 359 NLRB No. 40, decided in December 2012, the Board held that an employer has an obligation to bargain with a newly certified union over certain discretionary discipline of unit employees when there is no contract or interim grievance procedure in place, *before* it can issue any such discipline. This decision was novel and highly controversial. The Board did provide some caveats where the pre-imposition bargaining obligation would not apply -- including situations in which the parties have agreed to "an interim grievance procedure" and situations that involve only minor discipline. However, the contours of these limitations were obviously untested. Two recent developments provide some additional guidance for employers. First, the NLRB Division of Advice released a Memorandum on May 28, 2014, addressing the "minor discipline" issue. In *Kaplan International Centers*, Case No. 02-CA-110964, NLRB Advice Memo dated Mar. 24, 2014 (released May 23, 2014), the Division found that "final warnings" to teachers employed by the employer who were members of a newly certified union were not subject to *Alan Ritchey*'s pre-imposition bargaining obligation. The Division of Advice found that while the final warnings impacted the teachers' terms and conditions of employment, the warnings did not have "an inevitable and immediate impact on employees' tenure, status, or earnings, such as suspension, demotion, or discharge," which was the standard set forth in *Alan Ritchey.* This determination was based in part on the fact that the employer's progressive discipline system was discretionary and a final warning did not automatically lead to termination even if the employee engaged in further misconduct. Based on this decision from the Division of Advice, employers may issue warnings and other lower levels of discipline without having to bargain each warning first with the union (although employers should be aware that *post-imposition* bargaining obligations may still apply). Additionally, in *Medic Ambulance Service*, Case No. 20-CA-109532, ALJ Decision dated June 10, 2014, an NLRB ALJ provided another avenue for employers to avoid lengthy bargaining obligations with a union over discipline – an agreed grievance procedure that applies during bargaining for the first contract. This too was anticipated by the NLRB in *Alan Ritchey*. However, the General Counsel in *Medic Ambulance* argued that because the interim grievance procedure adopted by the parties did not include an option to progress the grievance to arbitration, it was not adequate to allow the employer to impose unilateral discipline. An NLRB ALJ disagreed, finding that an interim grievance process does not need to provide for arbitration to satisfy the requirements of *Alan Ritchey*, and upheld the discharges of 12 employees for misconduct. The decision in *Medic Ambulance* was decided only by an ALJ, and it may yet be appealed to the full Board, so employers should be careful should they rely on it. Both of these decisions should assist employers when navigating through discipline issues during the post-certification, pre-contract phase.

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