

ALERTS

Labor & Employment Law Alert - NLRB Overturns 30-plus Years Of Precedent Regarding “Witness Statements”

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For the last 30 years the, NLRB has held that employers were not required to produce to a union copies of witness statements gathered in the course of an employer’s disciplinary investigations. In *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), the Board had held that witness statements were confidential material and that “an employer’s duty to furnish information under Section 8(a)(5) of the National Labor Relations Act does not encompass the duty to furnish witness statements.” The Board concluded in that case that “requiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process.” That is, employers were able to categorically refuse to provide witness statements to a union.

Not anymore. In *Stephens Media*, 359 NLRB No. 39 (2012), and *Piedmont Gardens*, 359 NLRB No. 46 (2012), both issued in mid-December 2012, the Board dropped *Anheuser-Busch’s* categorical exemption of witness statements from the duty to furnish information and switched to a “balancing test.” Under this balancing test, employers must conduct a fact-specific analysis that balances a union’s need for the information against the employer’s legitimate and substantial confidentiality interests. Thus, employers may now have to produce witness statements to a union upon request in some circumstances.

Given the recency of these decisions, it will be important to keep abreast of future NLRB decisions on this issue as the Board hones when witness statements must be produced under its new fact-specific balancing test.

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