



NLRB Rules Employers May Maintain Discipline Between Election And Certification

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After an election is held to determine whether a union will become the representative of a company's employees, there is a period of time in which the results of the election are known, but have not been "certified" by the National Labor Relations Board (NLRB). It is an important period of time that can last a few days if no appeal is filed, or potentially years if the company and union litigate the results of the election.

During this period, an employer risks an unfair labor practice charge if it makes certain changes to employees' terms and conditions of employment, where the union is later certified as bargaining representative. What aspects of the workplace an employer can and cannot change during this limbo period has not received much attention from the Board, but a recent case sheds some light on what changes an employer can make.

In *Oberthur Technologies of America Corporation*, the Board ruled that an employer lawfully terminated four employees during the time after the union had won the election but before the results had been certified. Critically, in each discipline decision, the employer applied the same disciplinary standards in place before the union began organizing. Further, because the results of the union had not been certified, the employer had no duty to bargain with the union over the disciplinary decisions. Notably, the Board reminded employers that if the union is later certified, it can request after-the-fact bargaining over the discipline decisions – but the union failed to make such a request in this case.

The case is a useful reminder that while this period of time is fraught with risk, an employer can still lawfully maintain discipline in the workplace by sticking with set standards and procedures put in place before the union began organizing.