CLIENT ALERT

"Collyer Lite" -- NLRB Announces Limitation on Collyer Deferral

Jan.26.2012

On January 20, 2012, the Acting General Counsel for the National Labor Relations Board ("NLRB" or the "Board") issued a new policy Memorandum regarding the investigation and resolution of unfair labor practice charges in the context of workplace disputes arising under a collective bargaining agreement. The new policy places limitations on *Collyer* deferral, the decades-old policy pursuant to which the Board defers resolution of unfair labor practices charges when a grievance has been filed and is being processed in accordance with contractual arbitration procedures. In an 11-page Memorandum, the Acting General Counsel issued a time limitation on *Collyer* deferrals, noting that excessive delays often rendered "enforcement of a Board order 'pointless and obsolete.'" The Memorandum raised concerns that multi-year delays caused by the arbitration process interfered with the enforcement of statutory rights, as evidence becomes more and more difficult to gather with the passage of time. Furthermore, the Memorandum noted, changing circumstances at an employer often render injunctive relief moot by the time a case is resolved. To address these concerns, the Acting General Counsel announced a new policy that would essentially limit the length of a *Collyer* deferral to one year.

Under the new policy, when charges alleging violations of Section 8(a)(1) or Section 8(a)(3) are filed and the conduct is also the subject of a grievance filed under the grievance and arbitration provision of a collective bargaining agreement, the Regional office of the NLRB ("Region") will not automatically defer the charge, but will assess whether the arbitration process will be completed within one year. If the Region determines the process will "likely" be completed within one year, the Charge will be deferred, with further quarterly reviews of the arbitration process. Then, if the grievance is still pending at the time of the fourth 90-day review, the Region will issue a "show cause" letter to the parties, requiring an "explanation" regarding whether "deferral should not be revoked and a full investigation made." Unless the Regional Director is satisfied that deferral should continue, the investigation will be completed and a merits determination reached. If the Region determines the charge has merit, it will submit the charge to the Division of Advice in the Board's Office of the General Counsel in Washington, D.C. ("Advice"). Advice, in turn, will provide guidance to the Region with respect to the difficult and novel legal issues arising from the further processing of such charge.

Alternatively, if the Region's initial investigation upon receipt of a charge alleging a violation of Section 8(a)(1) or Section 8(a)(3) indicates that the arbitration process will exceed one year, the Region – after consulting with the parties and alleged discriminatees – will determine whether deferral is nonetheless appropriate, focusing upon the impact of the delays upon effectuation of the purposes and policies of the Act. If the Region determines that deferral in this context will "unduly disadvantage the Charging Party or otherwise frustrate the Board's ability to enforce the Act," the Region will conduct a full investigation to determine the merits of the Charge. The Region will then transfer the matter to Advice for further guidance, unless all parties would "prefer arbitration." If all parties prefer arbitration, Advice would be so notified before the Charge is placed in deferral status.

With respect to Section 8(a)(5) charges, the Region will ordinarily continue to apply the traditional *Collyer* deferral principles, as such charges usually turn on contract interpretation. Under the new policy, however, certain Section 8(a)(5) charges

determined to implicate Section 7 rights, or to "have as serious an economic impact on the Charging Parties as a Section 8(a)(1) and (3) charge," will be examined differently. That is, after the charge has been placed in deferral status or is likely to remain in deferral status for one year as determined at the outset of the investigation, the Regional Director has discretion to determine that the remedial authority of the Board would be frustrated, complete the investigation, and submit the matter to Advice.

The "*Collyer* Lite" pronouncement from the Acting General Counsel seems to reflect a growing effort by federal regulators to limit the utility of arbitration by requiring administrative or judicial resolution of employment disputes. While the Memorandum claims the Board is not abandoning its "twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes," the policy shift is likely to have the opposite effect, particularly when collective bargaining relationships are adversarial. The Memorandum specifically notes that the investigative inquiry concerning the one-year time limitation is necessary to ensure that its "statutory duty to prevent and remedy unfair labor practices is not thwarted by cases bogged down by a significant arbitration backlog."

In light of this announcement, employers seeking to continue the practice of arbitrating claims should assess contractual arbitration mechanisms and practices to ensure that the process can be completed within a one-year time frame, including placing time limitations on the arbitrators or the entire process, as an express term of the collective bargaining agreement. As always, Crowell & Moring labor and employment attorneys are available to assist employers in creating, evaluating and managing existing arbitration mechanisms to accommodate these new developments.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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