Why Yes Employer, You Must Continue to Deduct Union Dues From Your Employee's Wages Even After Contract Expiration

Labor & Employment Law Update

By John Hayes on October 7, 2022

In another glaring example of the National Labor Relations Board ("NLRB" or "Board") moving further away from the previous administration, the Board recently held that employers must continue deducting union dues from workers' paychecks (referred to as "dues checkoff") as agreed in their collective bargaining agreements ("CBAs"), even after those agreements expire. The decision reverses a 2019 ruling made under the Trump administration.

The NLRB's 3-2 decision (both Republican members dissented) in *Valley Hospital Medical Center, Inc.*, which was on remand from the Ninth Circuit, found that employers may not unilaterally stop dues checkoff upon the expiration of a CBA. This ruling reinstates an Obama-era requirement keeping dues-checkoff arrangements in force even after the CBA expires.

This issue has a somewhat tortured history. The Board's initial decision on dues checkoff goes back to 1962, where in *Bethlehem Steel* it held that an employer was free to end dues checkoff upon contract expiration. Then, in 2015 in *Lincoln Lutheran*, the Board held dues checkoff to be subject to the general statutory rule requiring employers to maintain most terms and conditions of employment after contract expiration to facilitate bargaining for a new agreement. Subsequently, in 2019, in the previous iteration of *Valley Hospital*, the prior Board majority reversed *Lincoln Lutheran*, again permitting employers to stop dues checkoff when a contract expires. In 2020 the Ninth Circuit found the Board's rationale in the original *Valley Hospital* to be arbitrary and not in line with prior Board cases regarding other common contract provisions that survive contract expiration. This is due to the fact that the NLRA generally prohibits employers from changing mandatory subjects of bargaining, such as wages and hours, without giving unions the opportunity to negotiate over their terms.

The Board's new *Valley Hospital* decision follows this general track and reinstates the rule of *Lincoln Lutheran*: that an employer, following contract expiration, must continue to honor a dues checkoff arrangement established in the CBA until

either a successor CBA is in place, or a valid bargaining impasse allows for unilateral action by the employer.

The Board majority found "that a dues-checkoff provision properly and reasonably belongs in the broad category of mandatory bargaining subjects that Section 8(a)(5) of the Act bars employers from changing unilaterally after the expiration of a contract, rather than in the small handful of exceptions to the rule. Thus, we again reject the *Bethlehem Steel* rule that *Valley Hospital I* improvidently reinstated." The Board found that dues checkoff does not involve a party giving up a legal right, unlike no-strike or management rights clauses— which do not extend past the expiration of a CBA. Instead, a dues checkoff provision reflects an employer's agreement to set up a payroll deduction, similar to those found in CBAs that deal with issues like insurance premiums. And thus should not be modified simply because the CBA has expired.

The Board also made clear that the reinstatement of the rule in *Lincoln Lutheran* would be applied retroactively to all pending cases and that this "would not cause manifest injustice." The decision relied heavily on the fact that employers had been operating under *Lincoln Lutheran* for several years and thus it was not a surprise, or a challenge, to continue to operate under that rule.

Yet again we have an "employer beware" decision by the Board that any company with a unionized workforce should be aware of. The NLRB is moving fast and furious under the current administration and employers should be mindful of staying up to date and current on all NLRB decisions and rulings.

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