

SEPTEMBER 4, 2015

As Expected, the NLRB Eliminates the Employer's Right to Terminate Dues Checkoff Upon Expiration of a CBA

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On August 27, 2015, the National Labor Relations Board, in *Lincoln Lutheran of Racine*, 362 NLRB No. 188, overturned 53 years of precedent, holding that, like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement that contains such a provision. The Board's determination is not surprising in light of its 2012 decision in *WKYC-TV*¹, which held similarly, but was overturned (on procedural grounds) by the U.S. Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

Since 1962, the Board has consistently held that dues checkoff provisions, which implement union security provisions by providing for the automatic deduction of union dues, may be cancelled by employers upon contract expiration. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962).

Over the last 15 years, however, the general rule set forth in *Bethlehem* was questioned in a trio of cases known as the *Hacienda* decisions. See *Hacienda Hotel (Hacienda I)*, 331 NLRB 665 (2000); *Hacienda Hotel (Hacienda II)*, 351 NLRB No. 32 (2007); *Hacienda Hotel, Inc. Gaming Corp. (Hacienda III)*, 355 NLRB No. 154 (2010). At the heart of the *Hacienda* cases was the Board's erosion of the principle that an employer's dues checkoff obligation did not survive expiration of an agreement, even in a right-to-work state where union security provisions are unlawful.

In *Lincoln Lutheran*, the Board completed the process of overturning the long standing pronouncements of *Bethlehem*. In language closely mirroring the decision in *WKYC-TV*, the Board held that "requiring employers to honor dues-checkoff arrangements post-contract expiration is consistent with the language of the Act, its relevant legislative history, and the general rule against unilateral changes in terms and conditions of employment." Notably, the Board held the new rule will only be applied prospectively, recognizing that *Bethlehem* was long-standing precedent and any other application of the ruling would work a manifest injustice. While the Board acknowledged, as it long has, that a select group of contractually established terms and conditions of employment – arbitration, no-strike, union security and management rights provisions – do not survive contract expiration, it explained that these provisions are treated differently than dues checkoff provisions because they "do not involve the contractual surrender of any statutory or nonstatutory rights." The one clear exception to this new rule, mentioned in a footnote of the

¹ See Glenn Smith and David Broderick, *NLRB Overturns 50-Year-old Precedent in Latest Decision on Dues Check-off Provision* (Littler Insight, Dec. 21, 2012).

opinion, is that an employer may bargain for the right to discontinue honoring a dues-checkoff provision post-expiration, so long as the waiver is “clear and unmistakable.”

What this Decision Means

It is now the case that, unless a CBA with a dues checkoff provision clearly provides otherwise, the only way a union will cease receiving dues after contract expiration from an employee who has signed a checkoff authorization is if the employee revokes the checkoff authorization (e.g., upon resigning from the union), or if there are no wages from which dues can be withheld due to a strike or lockout.

The practical implications of this decision will impact other strategies in labor-management relationships. For example:

- This decision potentially makes more legitimate an employer’s position that bargaining hard to avoid union security and dues checkoff is not as unreasonable as some critics have argued. Certainly, it will give bargaining parties more to discuss on this often routine bargaining subject.
- Under existing contracts, employers should consider whether to propose language specifically disabling dues checkoff at contract termination.
- Employers should also consider whether it makes sense to propose language that would automatically disable dues checkoff for the remainder of the CBA if the union strikes during the term of the agreement.
- Since the Board is willing to place greater restrictions on an employer’s ability to take unilateral action post-expiration, employers should consider other provisions that they may or may not desire to extend beyond the agreement term and work appropriate language into their next phase of bargaining proposals. For instance:
 - Extending a management rights provision;
 - Extending or expanding subcontracting rights, including permanent subcontracting rights;
 - Making sure that wage increases are not recurring (think of the onerous CBA requirement New York City schools have whereby the city must continue giving increases to teachers even though their CBA is long expired);
 - Establishing an end date on wage progression increases and suspending them at contract termination;
 - Addressing employee benefit contributions and coverage at the end of a CBA’s term;
 - Terminating successorship provisions at expiration - at present the law is unsettled as to whether they survive expiration; and
 - Reviewing fully every provision in an employer’s CBA and addressing with certainty what will occur at the end of the contract.

Finally, employers who have a currently-expired CBA and who have disabled dues checkoff should consult with experienced labor counsel regarding reinstating checkoff, communicating with the union and employees on the issue, and reconsidering their bargaining strategy in light of this development.