

NLRB Again Imposes Duty to Bargain Over Discipline Even Before Agreement on a Contract

On August 26, 2016, the National Labor Relations Board issued a decision in [Total Security Management Illinois 1, LLC](#), in which it held that an employer who is engaged in negotiations for an initial collective bargaining agreement with a recently certified union must provide the union with notice and an opportunity to bargain prior to imposing discretionary discipline on an employee within the bargaining unit. By doing so, the NLRB effectively reinstated its prior decision in [Alan Ritchey, Inc.](#), which had previously been invalidated by the Supreme Court in [NLRB v. Noel Canning](#).

Prior to *Alan Ritchey*, employers had been able to continue to impose discretionary discipline consistently with past practices while initial negotiations with a recently certified union were ongoing, and they were able to do so without providing notice and an opportunity to bargain. Employers can no longer comfortably do so without risking a violation of the National Labor Relations Act. Instead, employers who are engaged in negotiations with a recently certified union will need to provide the union with notice and an opportunity to bargain over any discretionary discipline that will materially alter an employee's terms of employment (i.e., termination, suspension, demotion, etc.).

However, the duty to bargain will not apply to discipline that does not materially alter the terms of employment (i.e., a verbal or written warning). The obligation also does not apply if the employer and the recently certified union have separately agreed on a disciplinary process, or if the discipline is non-discretionary, although employers should be careful when determining whether discipline is discretionary or non-discretionary..

Employers who are in the process of negotiating an initial collective bargaining agreement with a recently certified union should be mindful of this obligation going forward.

If you have any questions about this Information Memo, please contact [Christopher J. Stevens](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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