

NLRB Advice Memo Follows Alan Ritchey On Discretionary Discipline, Despite Nullification By Noel Canning

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In an [Advice Memo](#) released last week, the NLRB General Counsel continued to apply the Board's controversial decision in [Alan Ritchey, 359 NLRB No. 40 \(2012\)](#), which required employers to bargain before making discretionary discipline decisions in certain first contract situations where there is no contract or grievance procedure in place. The *Alan Ritchey* decision was nullified by the U.S. Supreme Court's *Noel Canning* decision in June, because Members Sharon Block and Richard Griffin, whose recess appointments were found invalid by the Supreme Court, took part in the decision. The Advice Memo adopted the reasoning of *Alan Ritchey*, but found that no bargaining obligation was required on the facts of the case because a negotiated discipline policy existed. Despite the *Noel Canning* issue, the Board is not expected to issue an updated decision in the *Alan Ritchey* case because it was closed following the original decision. This leaves the applicability of the reasoning in the original *Alan Ritchey* decision uncertain. Given the controversial nature of the original decision, which significantly limited employers' ability to respond to misconduct of its employees by requiring employers to bargain before making discretionary disciplinary decisions in certain situations, it is not clear whether the Board would adopt this position in later cases. However, the Advice Memo clearly indicates that the NLRB General Counsel believes the prior decision was rightly decided, stating "it is the General Counsel's position that Alan Ritchey was soundly reasoned and that the Board should adopt the Alan Ritchey rationale as its own." Whether the Board agrees remains to be seen. The Advice Memo is Washington River Protection Solutions, NLRB Case No. 19-CA-125339, Div. of Advice Memo, Oct. 14, 2014 (released Nov. 18, 2014). It is available on the Board's website [here](#).

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