

Employee-Union Rep Talks Now Protected In Maryland

?By former Associate Jack Blum

Effective October 1, 2012, the state of Maryland joined Illinois in taking legislative action to protect communications between employees and union representatives relating to grievance proceedings. These communications are now entitled to protections similar to those granted to conversations with a person's attorney, therapist, social worker, clergy member, or accountant. The passage of this legislation in Maryland in May 2012 was closely followed in July by a court decision implementing the privilege in Alaska. Those states' decision to join Illinois, as well as New York, which also adopted the privilege by judicial decision, may indicate that the so-called grievant-steward privilege, which protects communications between employees participating in grievance proceedings and union representatives or "stewards," is gaining momentum.

The new law applies to any employee represented by a labor organization, regardless of whether that employee is actually a member of the union. The statute also applies to employees whose workplaces have not been formally unionized as a "labor organization" is defined under the statute to include an organization that "seeks to represent" workers. If an employee has provided his or her labor organization with information "germane to a grievance" which is the subject of an investigation or any proceeding, then the union representative is, with some exceptions, now prohibited from disclosing that information, even after the termination of employment or the union's representation of the employee.

As is always the case with privileges, this new grievant-steward privilege does not protect the facts underlying an employee's communication with his or her union representative, only the *content* of the actual communication. As a result, an employer can still discover "what happened," but cannot find out "what you told your representative about what happened." Nonetheless, this new privilege will almost certainly hinder the ability of employers to discover information that is potentially relevant to an employment dispute. For example, an employee's statement made immediately after an incident is often valuable evidence, but if that statement is made to a union steward then the new law places it beyond the employer's reach.

While this privilege has only been adopted in a handful of states, it is still something that employers not subject to the laws of Maryland, Illinois, New York, or Alaska should know about. The National Labor Relations Board (NLRB) has – since its 1981 *Cook Paint and Varnish Co.* decision – considered it to be an "unfair labor practice" under Section 8(a)(1) of the National Labor Relations Act for employers to question union stewards about grievance-related conversations with an employee. With the recent presidential election guaranteeing at least four more years of an aggressively pro-labor/employee NLRB, it is possible that Maryland and Alaska's recent embrace of the grievant-steward privilege could prompt the NLRB to increase its enforcement efforts in this area.