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NLRB Pendulum Begins To Swing Back In Favor Of Employers

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In December 2017, the National Labor Relations Board (NLRB or Board) and its General Counsel were very active in reversing a number of decisions and initiatives issued under the Obama administration. This flurry of activity occurred because NLRB Chairman Philip Miscimarra's term expired on December 16, 2017. The Republican-led NLRB had a 3-2 majority and most of these decisions were issued on a 3-2 basis. The current Board is locked in a 2-2 split until Miscimarra's replacement is confirmed by the full Senate. President Trump has nominated a replacement but it will likely be a few months before the Senate considers that nomination.

This 2-2 deadlock may limit the pace of further reversals; however, in the meantime, we offer the following to help employers digest the December flurry of activity.

Joint Employer Standard Reversed

In *Hy-Brand Industrial Contractors*, 365 NLRB No. 156, the NLRB explicitly overruled the 2015 *Browning-Ferris Industries* decision and returned to the joint employer standard that had been followed for decades. In *Browning-Ferris*, the Board held that a company and its contractors could be deemed a single joint employer even when the two entities have never exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate." The two entities could be found to be joint employers based on the mere existence of "reserved" joint control or based on indirect control that is "limited and routine."

In its *Hy-Brand* ruling, the newly Republican-led Board stated that a finding of joint employer status requires proof that: 1) the alleged joint employers have actually exercised joint control over essential employment terms; 2) the control is "direct and immediate"; and 3) the control is not "limited and routine." The Board also announced the *Hy-Brand* joint employer standard would be applied retroactively to all cases in front of it, as well as all pending cases.

This is a significant decision for employers with all sorts of standard business agreements between independent companies, including user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, and other third party relationships. After *Browning-Ferris*, many companies had to scrutinize their contracts with third parties to determine whether those contracts provided a risk to the company that would be found to be a joint employer.

Hy-Brand is particularly important for these types of relationships, but especially franchisor-franchisee relationships. Even though franchise law requires some degree of oversight or control by the franchisor over the franchisees, the current NLRB determined it was never the intent of Congress to make franchisors joint employers of their franchisees' employees. Under *Hy-Brand*, it is significantly less likely that the typical franchisor-franchisee relationship will result in such entities being considered joint employers.

Interestingly, despite the new *Hy-Brand* standard, the NLRB majority found that the two companies in this case were joint employers because both had joint control through shared corporate personnel who were directly involved in the termination of seven employees. Both companies exercised this control through a common 401(k) plan, joint mandatory training, and annual meetings to review common employment policies, such as the EEO policy and policies governing workplace conduct. Thus, even though the standard has been revised, employers still need to structure their business relationships carefully to avoid a joint employer finding.

Workplace Rules, Policies, And Handbooks

In another 3-2 decision, the Board overruled *Lutheran Heritage Village-Livonia* in which the Board previously had held that facially neutral workplace rules, policies, and handbook provisions unlawfully interfered with rights protected by the NLRA if a facially neutral workplace rule could be "reasonably construed" by an employee to prohibit the exercise of NLRA rights. The reasonably construed test resulted in the invalidation of many facially neutrally handbook provisions and policies, and left many employers wondering whether their policies were valid.

In the *Boeing Company*, 365 NLRB No. 154, the NLRB established a new test when evaluating facially neutral policies, rules, or handbook provisions. The Board stated that when evaluating a facially neutral policy, rule, or handbook provision the test is whether, when reasonably interpreted, the rule would potentially interfere with the exercise of NLRA rights. The Board will evaluate two things: 1) the nature and extent of the potential impact on NLRA rights, and 2) legitimate justifications associated with the rule.

The Board announced three categories of workplace rules to provide greater clarity and certainty to employers, employees, and unions. Those include:

> Category 1 - Rules that are lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. For example, rules requiring employees to abide by basic standards of civility would be a lawful Category One rule.
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> Category 2 - Rules that warrant individualized scrutiny. In each case the Board will consider whether the rule in question, when reasonably interpreted, would prohibit or limit any NLRA-protected conduct and whether any associated justifications outweighed any adverse impact on NLRA rights.
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> Category 3 - Rules that the Board would designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, without justification sufficient to outweigh that adverse impact on NLRA rights. The Board noted an example of a Category 3 rule is a rule that would prohibit employees from discussing wages or benefits with each other.

In applying this new standard, the NLRB majority held *Boeing* lawfully maintained a no camera rule that prohibited employees from using camera-enabled devices to capture images or video without a valid business need and an approved camera permit. The Board held the rule potentially affected the exercise of NLRA rights, but the impact was comparatively slight and outweighed by important justifications, including national security concerns.

This decision is welcome news for employers. The *Boeing* standard significantly changes the way the Board evaluates employer rules, including rules pertaining to conduct in and out of the workplace, such as those involving social media. The new standard will expand the scope and type of rules the Board will find lawful, and improve employers' ability to tailor rules to suit their employees' needs. Employers' interest will carry more weight under the new test. Employers may wish to consider a review of policies, procedures, and handbooks because some rules that would have been found unlawful under the Obama Board's previous standard will be considered valid under the new *Boeing* standard. As with the joint employer standard, the NLRB stated it would apply the new *Boeing* standard retroactively to all pending cases at every level.

Micro-Bargaining Unit Decision Reversed

In *PCC Structurals*, 365 NLRB No. 160, the Board overruled *Specialty Healthcare* and replaced the "overwhelming community of interest" standard adopted in that case with the traditional "community of interest" standard for determining an appropriate bargaining unit in union representation cases.

Under *Specialty Healthcare*, if a union petitioned for an election among a particular group of employees and the employer took the position that the smallest appropriate unit had to include other employees who were excluded from the proposed bargaining unit, the Board would not find the petitioned-for unit inappropriate unless the employer proved that the excluded employees shared an "overwhelming community of interest" with the petitioned-for a group. That standard proved nearly impossible for employers to meet, and they were almost never successful in convincing the Board to add excluded employees to the petitioned-for unit.

Under the *PCC Structurals* decision, the Board reinstated the traditional "community of interest" standard for determining an appropriate bargaining unit in union representation cases. The Board noted that use of the traditional community of interest standard permits the Board to evaluate the interests of all employees -- both those within and those outside the petitioned-for unit -- without regard to whether those groups share an overwhelming community of interest.

Employers facing election petitions now have greater ability to affect the make-up of the petitioned-for bargaining unit. The Board remanded the case to the Regional Director to apply the correct standard.

Duty To Bargain Over Past Practice Changes

Historically, unionized employers have been able to make a unilateral change as long as the change was consistent with past practice. The employer still had to provide the union with a notice and the opportunity to bargain over the change, but the action is permitted where the change is part of a past practice and simply continues or maintains the status quo.

In 2016 the Obama Board changed that legal principle and held that "any" employer discretionary action amounted to a change that had to be bargained with the union, even if the employer's actions simply continue the past practice.

In *Raytheon*, 365 NLRB No. 161, the Trump Board returned to the previous labor law principle. In *Raytheon*, the company and union were parties to a collective bargaining agreement that allowed the company to make changes to its health benefit plans. For twelve years the company had exercised its right to make changes during the term of the parties' agreement. After the parties' agreement expired and before a new agreement had been negotiated, the company made unilateral changes to its health insurance plan consistent with its past practice. A NLRB administrative law judge, relying on the Obama precedent, ruled the company committed an unfair labor practice by making the change. On appeal, the 3-2 Republican-majority determined that the company was permitted to make the changes because it had made similar changes over the past 12 years.

The Board made it clear that, while the company was privileged because it unilaterally changed the health insurance plan consistent with its twelve year practice, it would be required to bargain with the union if, for example, the union proposed language to be included in the new collective bargaining agreement that would freeze health insurance benefits for the term of the agreement. Thus, while this is a welcome decision for employers, employers should still exercise caution in all bargaining and implementation decisions. The Board applied this decision retroactively, including the present case.

Ambush Election Rules

On December 14, 2017, the NLRB published a Request For Information for public comment on the NLRB's 2014 Representation Case Procedures (also known as the "ambush" election rules). Those 2014 rules significantly changed procedures for union representation elections by drastically shortening the amount of time between when the union files a representation petition and an election takes place.

The Board is seeking feedback on three questions:

1) Should the 2014 Election Rule be retained without change?

2) Should the 2014 Election Rule be retained with modifications? If so, what should be modified?

3) Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

Comments must be received by February 12, 2018.

Reasonableness Settlement Standard Reinstated

In 2016, the Obama Board held that an administrative law judge cannot accept a partial settlement of an unfair labor practice charge without the blessing of the General Counsel and the charging party unless the settlement offer constitutes a "full remedy of all of the violations alleged in the complaint." That means the employer would have to offer a settlement that would be the same as if the charging party would prevail on all issues that might be litigated in the case.

In *University of Pittsburgh Medical Center*, 365 NLRB No. 153, the Trump Board reversed the Obama-era policy and restored a "reasonableness" settlement standard. The Trump Board held that this "full remedy" standard contravenes Board policy by restricting the Board's prior ability to review the reasonableness of any respondent's offer to settlement terms accepted by the judge. The Board noted that acceptance of reasonable settlement terms may well be in the best interest of parties who unreasonably object to consent settlement agreements, or might be appropriate in cases where there may be multiple employers who may be affiliated with each other.

General Counsel Memo

On December 1, 2017, new General Counsel, Peter Robb, issued a Memorandum to all the Regional Offices setting forth his roadmap of how he intends to proceed. The General Counsel and Regional Offices have a great impact on the development of labor law under the National Labor Relations Act because they act as the prosecuting arm of the Board. Only those cases they believe constitute violations will be processed.

Over the last few administrations, the General Counsel has issued a Mandatory Advice Submission list -- which is a list of topics or cases that Regional Offices must submit to the General Counsel's office for further analysis before deciding whether or not to issue a complaint. These cases normally deal with cutting edge or new areas of the law, and the hope is that, by submitting such issues to the Advice Section of the General Counsel's office, not only will those decisions get the best analysis possible, but there will be consistency throughout the United States on the approach to various issues.

Needless to say, many of the issues on the new General Counsel's list involve issues that have been reversed by the Obama Board over the last eight years. Others are issues that have been pending in front of the agency for some period of time.

While space does not permit a full listing of the issues here, some of the issues involved cases which have already been decided since the General Counsel issued that Memorandum. (Joint employer standard, handbook rules standard, unilateral changes consistent with past practice -- all discussed above).

A couple of other issues in the Memorandum of note include:

1) Whether employees have a presumptive right to use their employer's email systems to engage in Section 7 activities (*Purple Communications* case).

2) *Weingarten* rights of employees, that is, whether employees in a non-union setting have a right to have a representative with them if the incident may lead to discipline.

3) Successorship issues (that is, when must an employer bargain with a company's employees when it purchases the company).

In addition to these legal issues identified, the General Counsel rescinded seven other General Counsel Memorandums issued between 2011 and 2017 on particular issues, that those General Counsels thought raised significant issues to take to the Board, but had not yet reached a Board decision.

Conclusion

One thing clear from all of the recent NLRB activity by both the Board and General Counsel is that employers should pay attention to decisions in 2018 and beyond. While many of these decisions will likely be more favorable to employers, staying current on the state of the law may be important to keep employers out of trouble. This is true regardless of whether your workforce is non-union or union. We will do our best to inform you of significant decisions as they arise.