NLRB Issues a Flurry of Decisions Overturning Employee-Friendly Board Law

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On December 14 and 15, 2017, the National Labor Relations Board issued several decisions rejecting employee-friendly rules previously adopted by the Board. The decisions, which address Obama-era Board rules on employer policies, joint employment and the appropriateness of bargaining units, were expected after Republicans regained majority control over the Board this fall. The flurry of decisions was triggered by the expiration of Chairman Philip Miscimarra's term on December 17, 2017, and with it, the temporary loss of a Republican majority on the Board.

The Board Adopts a New Test for Reviewing Employer Policies

During the Obama Administration, the Board, to the alarm of some employers, took the view that a number of common policies employers have routinely included in their employee handbooks unlawfully prohibited employees from engaging in protected Section 7 activity. The justification that the Obama Board used was the standard it had adopted years earlier in its *Lutheran Heritage Village-Livonia* decision, in which the Board held that employer rules that employees could "reasonably construe" as prohibiting Section 7 activity were unlawful. The Obama Board expanded the *Lutheran Heritage* standard significantly, resulting in the rejection of handbook policies adopted for reasons wholly unrelated to employees' protected concerted activity.

In a case involving The Boeing Company, however, the Board reserved course. In a 3-2 vote, it overturned its *Lutheran Heritage* decision. The Board concluded that the *Lutheran Heritage* test was flawed because it focused singularly on the employees' ability to organize and failed to take into account the challenges employers face in the workplace. The Board held that, going forward, in evaluating whether an employer rule unlawfully restricts protected employee activity under Section 7 of the NLRA, it will consider the employer's reasons for instating the rule, in addition to employee perceptions of the rule. Furthermore, the Board created three categories to classify employer rules. Category 1 includes rules that do not interfere with employees' Section 7 rights, or do so in a way that is minimal compared to the justification for the rule, such that they are presumptively valid. Category 2 includes rules that are close calls and require close scrutiny in each case. Category 3 consists of rules that are clear violations of Section 7 rights and are presumptively invalid.

Many are heralding this decision as the end of the Board's close second-guessing of routine employment policies.

The Board Overturns the *Browning-Ferris* Joint Employment Standard

In *Hy-Brand Industrial Contractors*, the Board voted 3-2 to reverse its decision in *Browning-Ferris Industries*, holding that a company must have "direct and immediate control" over workers to be a joint employer for the purposes of federal labor law. In so holding, the Board rejected the less demanding standard adopted by the Board in 2015.

For decades prior to *Browning-Ferris*, joint employer status under federal labor law required "direct and immediate control" over essential terms and conditions of employment. Crucially, the joint employer had to not only possess such power but also exercise it. In *Browning-Ferris*, the Board eliminated that rule and instead held that an entity that exercises indirect control or has reserved but unexercised control over the terms and conditions of employment could qualify as a joint employer. This more relaxed standard subjected many more entities to joint-employer status and related obligations and, according to critics, created uncertainty surrounding companies' potential liability as a result of joint employment relationships.

In *Hy-Brand Industrial Contractors, Inc.*, the Board excoriated the *Browning-Ferris* decision, arguing that the decision exceeded the Board's statutory authority and upended a longstanding and stable rule for a vague and unpredictable one. The Board also stated that *Browning-*

Ferris lacked adequate justification in law and policy and adopted the rule without the "clear congressional command" needed to make such a significant change in the Board's precedent. Accordingly, the Board returned to the pre-*Browning-Ferris* standard, requiring "direct and immediate control" to find a joint employment relationship.

The Board's decision, along with the Secretary of Labor's June 7, 2017 withdrawal of the Department of Labor's 2016 Administrator's Interpretation on joint employment regarding enforcement of the Fair Labor Standard Act, indicates that federal agencies in the Trump era will be taking a narrower view of joint employment than they took during the Obama Administration.

The Board Eliminates the "Overwhelming Community of Interest" – a/k/a "Micro-Unit" – Standard for Determining Appropriate Bargaining Units

With its 3-2 decision in *PCC Structurals, Inc.*, the Board overturned an Obama-era standard for determining appropriate bargaining units for collective bargaining. In its 2011 decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, the NLRB held that if the Board concluded that the workers in the petitioned-for unit shared a traditional community of interest, then the unit was appropriate, and the burden shifted to the party seeking a larger unit (usually the employer) to show that excluded employees share "an overwhelming community of interest" with the petitioned-for employees. This heightened standard made challenging the bargaining units chosen by unions extremely difficult. As a result, unions were increasingly petitioning to organize small units of employees, referred to as "micro-units," because the *Specialty Healthcare* standard made it difficult for employers to successfully challenge them.

In *PCC Structurals, Inc.*, the Board dispensed with *Specialty Healthcare*'s heightened burden for challenging petitioned-for bargaining units, and returned to the traditional community of interest standard that had long been in place before *Specialty Healthcare*. Now the Board will determine if petitioned-for employees "share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." This standard considers not just commonalities between the petitioned-for employees, but also whether excluded employees share those same commonalities. Going forward, unions will have a more difficult time organizing small, "micro-units."

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With Chairman Miscimarra's term expired, the Board now has two members from each party. As a result, the Board is not expected to issue any significant decisions until President Trump's nominee to the Board is confirmed some time in 2018. However, once Trump's pick is confirmed, it is expected that a more conservative interpretation of federal labor law will continue to prevail at the Board.

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