Steven Gutierrez

Partner
303.295.8531
Denver
sgutierrez@hollandhart.com

NLRB Overturns Controversial Standards on Joint-Employer Status and Neutral Employment Policies; Questions Quickie Election Rule

Insight — 12/14/2017

In a series of decisions that affect both union and non-union employers, the National Labor Relations Board (NLRB or Board) has overruled numerous controversial standards that had broadened the coverage of employee rights in recent years. On December 14, 2017, the Board returned the standard for determining joint-employer status to the pre-*Browning-Ferris* standard as well as walking back the standard for determining whether facially neutral employment policies infringe on employees' section 7 right to engage in protected concerted activities. The return to more employer-friendly standards will help ease the risk of engaging in unfair labor practices under the National Labor Relations Act (NLRA). Here are the highlights of the new developments.

Joint-Employer Status Depends on Control

In its 2015 controversial decision in *Browning-Ferris Industries*, the NLRB significantly broadened the circumstances under which two entities could be deemed joint employers for NLRA purposes. In that case, the Board ruled 3-to-2 that Browning-Ferris Industries was a joint employer with a staffing company that provided workers to its facility for purposes of a union election because Browning-Ferris had indirect control and had reserved contractual authority over some essential terms and conditions of employment for the workers supplied by the staffing company.

Today, in a 3-2 decision, the now Republican-majority Board overruled *Browning-Ferris*, now requiring that two or more entities actually exercise control over essential employment terms of another entity's employees and do so *directly and immediately* in a manner that is not limited and routine, in order to be deemed joint employers under the NLRA. This returns the joint-employer standard to the pre–*Browning-Ferris* standard. Consequently, proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine, will no longer be sufficient to establish a joint-employer relationship.

This doesn't mean that the Board will no longer find two or more entities to be joint employers under the NLRA. In fact, in the current case in which it overturned *Browning-Ferris*, it applied the tougher standard and still ruled that two construction companies were joint employers and therefore jointly

and severally liable for the unlawful discharges of seven striking employees. Still, the requirement that entities have direct control that is exercised over the workers in question is a more workable and beneficial rule for employers.

New Standard For Facially Neutral Policies

In recent years, the NLRB has ruled that many types of standard employee policies unlawfully interfered with employees' section 7 rights. That scrutiny went back to the 2004 decision in *Lutheran Heritage Village-Livonia* which ruled that employer policies that could be "reasonably construed" by an employee to prohibit or chill the employees' exercise of section 7 rights violated the NLRA, even if such policies did not explicitly prohibit protected activities or were not applied by the employer to restrict such activities. Consequently, a series of Board rulings deemed certain language in employer policies unlawful even when facially neutral on their face, including policies on confidentiality, non-disparagement, recording and video at work, use of social media and company logos, and other typical employment rules.

In its recent decision, the Board ruled 3-to-2 to overturn *Lutheran Heritage Village-Livonia* and its standard governing facially neutral workplace rules. The new standard for evaluating employer policies will consider: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. To provide greater clarity for employers, employees, and unions, the Board announced that prospectively, it will categorize workplace rules into three categories depending on whether the rule is deemed lawful, unlawful, or warrants individualized scrutiny. This change should significantly relieve the uncertainty that has existed under the "reasonably construed" standard.

Quickie Elections Being Reconsidered

In another move to reverse recent Board rules, the Board published a Request for Information (RFI) asking for public input on the 2014 representation election rule that changed the process and timing of union elections. In particular, the Board seeks public input on whether the 2014 quickie election rules should be retained, changed, or rescinded. The deadline for submitting responses is February 12, 2018. This RFI signals that the quickie election rule could be on its way out.

Conclusion

We will continue to monitor these and other Board developments. If you have any questions or concerns about these changes and how they may affect your workplace, please contact me at SGutierrez@hollandhart.com or reach out to the Holland& Hart attorney with whom you typically work.
