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A CLOSER LOOK AT 2 PRO-BUSINESS REVERSALS AT THE NLRB

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Union and nonunion employers alike have reason to celebrate and it's not just because it is holiday season. Last week, the National Labor Relations Board overruled numerous controversial standards that had broadened the coverage of employee rights in recent years.

It is no coincidence that it was NLRB Chairman Philip Miscimarra's final week on the board. Miscimarra, a Republican, had announced in August that he would not seek a second term on the board, instead choosing to depart when his term expired on Dec. 16, 2017. So it is no surprise that he seized on the opportunity to lead the board in overturning many pro-employee decisions for which he had dissented during years when Democratic appointees dominated the board.

On Dec. 14, 2017, the board issued two significant decisions, one returning the standard for determining joint employer status to the pre-Browning-Ferris standard and the second 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 to employers of engaging in unfair labor practices under the National Labor Relations Act. Here are the highlights of the new developments.

Joint Employer Status Depends on Control

In its 2015 controversial Browning-Ferris Industries decision, the NLRB significantly broadened the circumstances under which two entities could be deemed joint employers for NLRA purposes. In that case, the board ruled 3-2 (with then-member Miscimarra in the dissent) 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.

In its recent Hy-Brand Industrial Contractors decision, the now Republican-majority board overruled Browning-Ferris, returning the joint-employer standard back to its pre-Browning Ferris days, requiring that two or more entities actually exercise control over essential employment terms of another entity's employees and that they do so directly and immediately in a manner that is not limited and routine.

In the Hy-Brand Industrial Contractors case, five Hy-Brand employees and two employees of Brandt Construction Company were fired after they went on strike to object to their wages, benefits and workplace safety issues. The board agreed that the seven employees were engaged in protected concerted activities under Section 7 of the NLRA, and that their discharges constituted unlawful interference with their rights. The board, however, took issue with the legal standard used to determine whether Hy-Brand

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and Brandt were joint employers, namely the Browning-Ferris standard.

In the 3-to-2 decision, the Republican-majority members of the board wrote a scathing critique of the 2015 standard, stating that "the Browning-Ferris standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the [NLRA], it is ill-advised as a matter of policy, and its application would prevent the board from discharging one of its primary responsibilities under the [NLRA], which is to foster stability in labor-management relations."

The decision went on to say that in Browning-Ferris, the board had exceeded its statutory authority and had rewritten the decades-old test for determining who the employer is. In overruling Browning-Ferris, the board reverted to the standard under prior cases examining whether a putative joint employer's control over employment matters is direct and immediate. Therefore, 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.

Interestingly, the board went on to apply the pre-Browning-Ferris standard to the Hy-Brand and Brandt terminations and ruled that the two construction companies were joint employers, making them jointly and severally liable for the unlawful discharges of the seven striking employees. Specifically, the same person served as corporate secretary for both companies, was directly involved in the decisions to fire all seven strikers, and was the primary individual making hiring decisions. Moreover, employees of both companies participated in the same 401(K) and health benefit plans and were covered by the same workers' compensation policy. The workers at both companies attended common training sessions and employment policies were common to both entities. This evidence convinced the board that the two entities actually exercised joint control over the employment terms of the employees, that the control was direct and immediate, and it was not limited and routine, making them joint employers even under the stricter, pre-Browning-Ferris standard.

What This Means for Employers

The Hy-Brand decision is good news for employers, making it more difficult for two or more entities to be found to be joint employers than under the Browning-Ferris standard. Yet, entities still must be careful not to exercise direct control over workers who are employed by another entity. Companies that use staffing or employee-leasing agencies to provide workers should be careful that their contracts with the agencies maintain the separate employment relationship and that supervisors do not directly control the hiring, firing, wages and benefits for the leased/staffing employees. In addition, when companies are related or affiliated and share common management, care should be taken to have separate employee policies, handbooks, benefits and management so as not to create a joint employment status.

New Standard for Facially Neutral Policies

In recent years, the NLRB has ruled that many types of typical employment policies, work rules and employee handbook provisions unlawfully interfered with employees' Section 7 rights. The test for this heightened scrutiny goes back to the 2004 board

decision in Lutheran Heritage Village-Livonia which ruled that an employer policy would be deemed unlawful if (1) it could be "reasonably construed" by an employee to prohibit or chill the employees' exercise of Section 7 rights; (2) the rule was created in response to union activity; or (3) the rule had been applied by the employer to restrict the exercise of Section 7 rights.

Much to the frustration of employers, many NLRB cases that followed focused on the "reasonably construed" standard, making it almost impossible for employers to determine whether a facially neutral employment policy (i.e., one that did not explicitly restrict Section 7 rights) would be deemed acceptable or unacceptable to the board. In fact, in recent years, the Democratic-majority boards have ruled that certain language in standard employer policies (i.e., the type found in almost every employee handbook) was unlawful, even when facially neutral on its face, including policies on confidentiality, nondisparagement, recording and video at work, use of social media and company logos, and other typical employment rules. This led many employment lawyers to recommend that employers include explicit statements in their policies and handbooks that the policy was not intended and should not be construed to limit employees' Section 7 rights.

In its recent Boeing Company decision, the board ruled 3-2 to overturn Lutheran Heritage Village-Livonia and its standard governing facially neutral workplace rules. At issue in the Boeing Company case was whether Boeing's no-camera rule that restricted employee use of camera-enabled devices such as smart phones on its property constituted unlawful interference with the exercise of NLRA-protected rights. The board noted that Boeing's no-camera rule did not explicitly restrict activity protected by Section 7, it had not been adopted in response to NLRA-protected activity, and it had not been applied to restrict such activity. But, in applying the "reasonably construed" Lutheran Heritage standard, the administrative law judge (ALJ) had found that the no-camera rule was unlawful.

The board reversed the ALJ's decision, and overruled the Lutheran Heritage "reasonably construed" standard. It stated that the board would "no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." Instead, the board articulated a new standard for evaluating employer policies which would evaluate two things: (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, as follows:

- Category 1 will include rules that the board designates as lawful to maintain, either because the rule, when reasonably interpreted, does not prohibit or interfere with NLRA rights, or the potential adverse impact on protected rights is outweighed by

justifications associated with the rule. An example of a category 1 rule is Boeing's no-camera rule which the board agreed was a necessary part of Boeing's security protocols, and the company's need to comply with federal contracting and federally mandated nondisclosure of export-controlled and proprietary information. Another example of category 1 rules would be other rules requiring employees to abide by basic standards of civility.

- Category 2 will include rules that need individualized scrutiny in each case to determine whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 will include rules that the board designates as unlawful to maintain because they would prohibit or limit NLRA-protected conduct and the adverse impact on NLRA rights is not outweighed by justifications for the rule. An example of a category 3 rule would be one that prohibits its employees from discussing wages or benefits with one another.

What This Means for Employers

This change in the standard by which facially neutral employment policies will be evaluated should significantly relieve the uncertainty that has existed under the "reasonably construed" standard. Employers should be able to write and implement employment policies and work rules that serve a legitimate business interest with less fear that they may be subject to an unfair labor practice simply for maintaining the policy or rule. Employers still should make certain they can articulate a legitimate justification for each policy and should take care not to enforce any policies or rules in a manner that restricts employees' Section 7 rights.

Quickie Elections Being Reconsidered

In another move to reverse recent board rules, on Dec. 12, 2017, 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. (Not surprisingly, then-member Miscimarra vigorously dissented when the final rule was issued.) The deadline for submitting responses is Feb. 12, 2018. This RFI signals that the quickie election rule could be on its way out.

It is unclear whether the "quickie election" rules resulted in more union victories over the past two-and-one-half years — evidence seems mixed. But the shorter time from the filing of the petition until the election certainly caused employers to mount a fast-and-furious campaign to oppose the union's organizing efforts.

Conclusion

Miscimarra led the board in taking strategic and deliberate aim at the many controversial rulings of the past few years, resulting in these significant pro-business reversals. Depending on the future political make-up of Congress and the White House, we'll have to see if any legislation is enacted to alter or solidify these positions in the

future, thereby preventing the inevitable flip flop that occurs with the change in administrations and agency leadership. In the meantime, it appears that employers can enjoy a return to more measured standards by the NLRB.

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