Published on *The National Law Review* https://natlawreview.com

NLRB Reverses Key Rulings: Returns to Pre-Obama Board Test for Deciding Joint-Employer Status and for Determining Whether Handbooks, Rules and Policies Violate the NLRA – Assessment of 2014 Expedited Election Rules and Future Changes Also Announced

Article By:

Steven M. Swirsky

It should come as no surprise that recent days have seen a stream of significant decisions and other actions from the National Labor Relations Board as Board Chairman Philip A. Miscimarra's term moves towards its December 16, 2017 conclusion. Chairman Miscimarra, while he was in a minority of Republican appointees from his confirmation during July 2013 and as a new majority has taken shape with the confirmation of Members Marvin Kaplan and William Emanuel, has clearly and consistently explained why he disagreed with the actions of the Obama Board in a range of areas, including the 2015 adoption of a much relaxed standard for determining joint-employer status in *Browning-Ferris Industries,* the standard adopted in *Lutheran Heritage Village* for determining whether a work rule or policy, whether in a handbook or elsewhere would be found to unlawfully interfere with employees' rights under Section 7 of the National Labor Relations Act to engage concerted action with respect to their terms and conditions of employment, and his disagreement with the expedited election rules that the Board adopted through amendments to the Board's election rules.

The Board's New Standard for Determining Joint Employer Status

In Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co., decided on December 14, 2017, in a 34-2 decision, the Board has discarded the standard adopted in *Browning-Ferris,* and announced that it was returning to the previous s standard and test for determining joint-employer status and returning to its earlier "direct and immediate control standard." Under this standard, "A finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine,'" and once again adopting a test that requires a showing that a putative joint –employer possesses "direct and immediate" control over the terms and conditions of employment of the employees of another employer.

In rejecting *Browning-Ferris,* the majority returns to a standard based on the common law test for determining whether an employer-employee relationship exists as a predicate to finding a joint-employer relationship. Under *Hy-Brand*, a finding of joint-employer will require

proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"

The majority, consisting of Chairman Miscimarra and Members Kaplan and Emanuel explained why they were rejecting *Browning-Ferris:*

We think that the *Browning-Ferris* standard is a distortion of common law as interpreted by the board and the courts, it is contrary to the [National Labor Relations Act,] 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 Act, which is to foster stability in labor-management relations.

The Board's New Standard Governing Workplace Policies

In The Boeing Company, also decided on December 14, 2017, the Board adopted new standards for determining whether "facially neutral workplace rules, policies and employee handbook standards unlawfully interfere with the exercise" of employees rights protected by the NLRA.

In *Boeing*, the Board establishes the following new test:

when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule."

Boeing offers assistance to employers and others who wish to evaluate the legality of any particular rule or policy, by creating three categories of rules for this purpose:

Category 1 will include rules that the Board designates as 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. Examples of Category 1 rules are the no-camera requirement maintained by Boeing, and rules requiring employees to abide by basic standards of civility. Thus, the Board overruled past cases in which the Board held that employers violated the NLRA by maintaining rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace.

Category 2 will include rules that warrant individualized scrutiny in each case as to 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 will designate 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 associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

While the Board's setting of these categories offers guidance, it will remain critical for employers and others to carefully assess each proposed rule and policy since the potential for substantial overlap between the categories will exist.

Equally important will be the application of rules and policies that may be facially lawful but subject to unlawful or inconsistent application.

An Assessment of the 2014 Expedited Election Rules

Because the expedited election rules were adopted through administrative rule making under the Administrative Procedures Act, the Board cannot simply discard or revise the 2015 amendments.

Noting that the 2014 Election Rules were adopted over the dissent of Chairman Miscimarra and then Member Harry Johnson, and the fact that these rules have now been effect for more than two years, on December 14th, the Board, over the dissents of Members Mark Pearce and Lauren McFerren, both of who were appointed by President Obama, published a Request for Information, seeking comment on the following 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 Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?

In explaining its decision to issue the Request, the Board majority has made clear that it is seeking the views of all interested parties, including labor and management, those in government and the Board's General Counsel. It has also made clear that while it is possible that it may engage in rulemaking to further amend the election rules and procedures, it may maintain the 2014 Election Rules without change, noting that "the Board merely poses three questions, two of which contemplate the possible retention of the 2014 Election Rule."

National Law Review, Volume VII, Number 349