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Unwrapping Late Year NLRB Decisions – Next Steps For Your Organization to Consider

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Two weeks after newly appointed National Labor Relations Board General Counsel Peter Robb signaled his intent to ask the Board to consider overruling many union-friendly precedents of the Obama-era Board, the Board has beaten him to the punch. Over the course of two days (December 14 and 15), the Board repudiated three of the Obama Board's most vexing decisions – on joint employer status (*Browning-Ferris industries / HY-Brand Industrial Contractors*), micro-bargaining units (*Specialty Healthcare / PCC Structurals*) and employer workplace rules and policies (*Lutheran Heritage-Livonia / The Boeing Company*). The Board's spate of employer-friendly decisions provides a number of opportunities for the proactive employer.

In *Hy-Brand Industrial Contractors*, the Board overruled *Browning-Ferris Industrie*s, 362 NLRB No. 186 (2015), which held two entities are joint employers where the second employer exercises indirect control over another entity's employees, or where the second employer has reserved rights of control, even if unexercised. In *Hy-Brand,* the reconstituted Board reversed course, returning to prior precedent finding joint employer status only where the second entity has *actually* exercised control over the other entity's employees and has done so "directly and immediately."

In P*CC Structurals,* 365 NLRB No. 160 (December 15, 2017) the Board overruled *Specialty Healthcare*, 357 NLRB 934 (2011), which made it easier for unions to organize so-called "micro-units." Instead, the Board returned to its prior analysis for assessing "whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees." Under *PCC*, the Board no longer will shift the burden to employers to establish excluded employees share such an "overwhelming

community of interest" with petitioned-for employees that there is "no legitimate basis upon which to exclude [them] from" the petitioned-for unit because the traditional community-of-interest factors "overlap almost completely." Instead, the Board will not carve out a "micro-unit" unless it finds petitioned-for employees "share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." The revised standard will make it more difficult for unions to carve out smaller, artificial groups in an effort to disenfranchise employees who are inclined to vote against union representation.

Finally, in *The Boeing Corporation,* 365 NLRB No. 164 (December 15, 2017), the Board revised its standard for assessing whether workplace rules and policies interfere with employee rights under Section 7. *Boeing* overruled *Lutheran Heritage-Livonia*, 343 NLRB 646 (2004), in which the Board broadly held unlawful rules which employees could "reasonably construe" to prohibit Section 7 activity. *Boeing* replaces this assessment with a two-part analysis evaluating (1) the nature and extent of the potential impact of the rule on NLRA rights, and (2) legitimate justifications associated with the rule. The new test requires scrutinizing rules on several levels: (1) to determine whether, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights; (2) whether any rules that do have a reasonable tendency to interfere with Section 7 rights have been deemed by the Board's to be lawful because the risk of such interference is outweighed by the justifications associated with the rules; and (3) to determine the justification for certain rules that have a potential adverse impact on NLRA activity and whether that outweighs the potential adverse impact on Section 7 rights.

What Employers Should Do Now

The Board's holiday-time decisions provide the opportunity for employers to reclaim rights lost to activist decisions of the Obama Board. Consider the following steps:

1. To the extent your organization has avoided certain ventures or business relationships due to potential joint employer liability, **reassess whether joint employer fears remain significant** and your risk/reward assessment. Likewise, reassess situations in which your organization has avoided engaging with third party labor. While the threat of joint employer status and potential liability remains, employers may have more leeway to run their business without being deemed to be a joint employer.

2. Conduct a **bargaining unit analysis** to determine whether there are opportunities to reinforce facts and practices which will buttress your organization's arguments in support of more favorable bargaining unit configurations. For example, conventional wisdom is that "wall-to-wall" bargaining units are much more difficult for unions to organize than smaller, discrete units which may harbor pockets of discontent.

3. **Consider a full review of policies and procedures.** Some rules found unlawful under the Obama Board's expansive reading of Section 7 are once again lawful and may be reinserted in employer policies. Of particular focus are rules addressing "respectful conduct," prohibiting "insubordination," and prohibiting use of cameras and recording devices. Boeing greatly increases the right of employers to implement justified, facially neutral rules which can be read to interfere with Section 7 rights only through a tortured reading.

4. **Continue to train managers and supervisors.** While the Trump Board has scaled back some of the excesses of its predecessor, the new focus on protected concerted activity in non-union

workplaces cannot be put back into the proverbial bottle. Training for management employees on Section 7 rights and positive employee relations remains essential.

Laura A. Pierson-Scheinberg *also contributed to this post.*

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