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The NLRB Releases Several Key Decisions Setting New Tone

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The National Labor Relations Board (NLRB) released several significant decisions last week affecting all employers and their obligations under the National Labor Relations Act (NLRA). First, the NLRB overruled *Lutheran Heritage* and established a new standard for determining whether facially neutral workplace policies unlawfully interfere with Section 7 rights. Next, the NLRB reversed the broad joint-employer standard adopted in *Browning-Ferris* and reinstituted the previous standard to determine joint-employer status. Then, the NLRB overturned its 2011 decision, which permitted labor unions to petition to represent "micro-units" and returned to its traditional "community interests" standard. Finally, the NLRB held that employers have no duty to provide notice to unions or an opportunity to bargain over adjustments to employment terms and conditions which are a past practice of the employer.

A more detailed explanation of the recent decisions can be found below.

Boeing Co. **Overturns the** ***Lutheran Heritage*** **Standard for Employment Policies**

On December 14, 2017, the National Labor Relations Board overruled the standard established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether facially neutral workplace policies unlawfully interfere with rights protected under Section 7 of the National Labor Relations Act. With a 3-2 decision in *Boeing Co.*, 365 NLRB No. 164, the new Republican majority Board determined a rule's impact on workers' rights and the employer's justifications for the rule should be balanced in determinations of legality under the NLRA. Under the new *Boeing* standard, previously unlawful rules, such as no-camera policies and handbook provisions requiring employees to maintain basic standards of civility in the work place may now be lawful.

Under the *Lutheran Heritage* standard, employers violated the NLRA by maintaining facially neutral workplace rules that did not explicitly prohibit protected activities, were not adopted in response to such activities and were not applied to restrict such activities, if the rules would be "reasonably construed" by an employee to prohibit the exercise of Section 7 rights.

In *Boeing Co.*, the Board established a new test for evaluating the legality of a facially neutral policy, rule or handbook provision that could potentially interfere with the exercise of NLRA rights. Under *Boeing Company*, the Board will now consider two factors: (1) the nature and extent of the potential impact on NLRA rights; and (2) legitimate justifications associated with the rule.

For example, the Board found that Boeing lawfully maintained a no-camera rule, which prohibited employees from using camera-enabled devices to capture images or video on workplace premises, without a valid business need and a permit. The Board found while the rule may potentially affect the exercise of NLRA rights, that impact was outweighed by important justifications, including national security concerns.

The *Boeing Co.* decision also lays out three categories into which the Board will classify workplace rules. The first category includes rules that are always legal because they either cannot reasonably be interpreted to interfere with workers' rights or any interference is outweighed by business interests. The second category comprises rules that are legal in some cases depending on their application. The third category covers rules that are always illegal because they interfere with workers' rights in a way not outweighed by business interests.

In light of *Boeing Co.*, some rules found unlawful under the *Lutheran Heritage* Board's expansive reading of Section 7 rights may now be reinstated in employer policies, particularly rules addressing "respectful conduct" and prohibiting the use of cameras and recording devices. However, the Board did note that although maintaining certain rules may be lawful, the application of such rules to employees engaging in NLRA-protected conduct may still violate that Act

NLRB Reverses *Browning-Ferris* Joint-Employer Standard

On December 14, 2017, the National Labor Relations Board reversed the broad joint-employer standard adopted in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 186 (2015), and reinstituted the previous standard to determine joint-employer status. The decision marks a return to the focus being on "whether two entities *exercised* joint control over essential employment terms," and whether that control is "*direct and immediate*." 365 NLRB 156 slip op. at 1 n. 2,3 (2017).

The decision came following the NLRB's review of an administrative law judge's decision that Hy-Brandt Industrial Contractors, Limited (Hy-Brandt) and Brandt Construction Company (Brandt) constituted a joint employer for purposes of the National Labor Relations Act. The NLRB agreed the two entities were a joint employer, but determined the incorrect standard was applied. In *Browning-Ferris*, the NLRB held "even when two entities have *never* exercised joint control over essential terms and conditions of employment, and even when any joint control is not direct and immediate, the two entities will still be joint employers based on the mere existence of reserved joint control, or based on indirect control or control that is limited and routine." *Id.* at 1. The majority opinion came down hard on this standard, referring to it as, among other things, "a distortion of common law" and "ill-advised as a matter of policy." *Id.*

Thus, the NLRB returned to a standard the majority said "has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world." *Id.* at 34. This standard focuses on whether joint control of employees is actually exercised, whether such control has a direct and immediate impact on employment terms, and whether such control is not merely limited and routine. *Id.* at 34, 35. Applying this standard to the facts of the case before them, the NLRB found that Hy-Brandt and Brandt constituted a joint employer and, therefore, were jointly and

severally liable for the unfair labor practice of unlawfully discharging seven striking employees. In determining the two entities were a joint employer, the NLRB considered the same individual acted as the corporate secretary for both companies and was involved in the termination of employees at both companies, employees at both companies participated in the same 401(k) and health benefit plans, the employees attended common training sessions and an annual corporate meeting, and the employees worked in accordance with common employment policies. *Id.* at 31. Therefore, the NLRB found joint control was actually exercised and it had a direct and immediate impact on the employees of Hy-Brandt and Brandt. *Id.*

NLRB PROHIBITS ELECTIONS WITHIN "MICRO-UNITS" AND RESTORES TRADITIONAL LAW

On December 15, 2017, the NLRB overturned its 2011 decision *Specialty Healthcare*, 357 NLRB 934 (2011), that permitted labor unions to petition to represent "micro-units" – or small and distinct groups of employees employed by an employer. *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). The NLRB expressly returned to its traditional and historic "community of interests" standard in *United Operations*, 338 NLRB 123 (2002).

In *PCC,* the regional director in Portland, Oregon approved an election petition amongst 100 welders who worked on castings for jet aircraft, gas turbines and other industrial equipment. The employer appealed this determination arguing the only appropriate unit included all 2,565 production and maintenance employees at three locations within a five mile radius where the employer operates. The regional director agreed with the union that the 100 welders had shared workplace interests and the employer failed to meet the strict burden of establishing that the welders had an overwhelming "community of interest" with the remaining 2,465 employees as required by the NLRB in *Specialty Healthcare*.

The NLRB determined in *PCC Structurals* the *Specialty Healthcare* standard is "fatally flawed" and may no longer be utilized. The Board explained the agency has a duty in each case to ensure a petition for a bargaining unit is appropriate for collective bargaining. Under *Specialty Healthcare*, the Board did not fulfill that duty because it surrendered discretion to a petitioning agent – a labor union – who selected the scope of the unit and the employees it would contain. This practice does not assure employees both inside and outside of the petitioned-for unit their fullest freedom in exercising potential rights under the National Labor Relations Act, including not only the right to support a union, but as importantly, the right to refrain from supporting the union. Moreover, the *Specialty Healthcare* standard does not ensure bargaining units will not be "arbitrary, irrational, or fractured – that is, composed of a gerrymandered grouping of employees."

The Board reinstituted the traditional standard to determine the scope and constitution of a bargaining unit which is "whether the group of 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." In determining a petition for a unit the NLRB will once again consider whether the employees in the unit, as opposed to other employees outside the unit:

- have distinct skills and training;
- have distinct job functions, and perform distinct work;
- are functionally integrated with the employer's other employees;
- have frequent contact with other employees;
- have interchange with other employees;

- have distinct terms and conditions of employment and are separately supervised

Generally, where the employees in the petitioned-for unit share a community of interest, they should remain in the same unit. Applying this standard to the *PPC* workplace, the NLRB concluded the 100 welders in the petitioned-for unit were not sufficiently distinct from their 2,465 co-workers to justify separate units and as such, a "wall to wall" unit of all of the employer's production and maintenance workers was directed.

The standard identified in *PCC* shall be applied retroactively to all pending and future matters.

NLRB CONCLUDES EMPLOYERS HAVE NO DUTY TO OFFER TO BARGAIN OVER A CONTINUATION OF PAST PRACTICES

On December 15, 2017, the National Labor Relations Board concluded employers have no duty to provide notice to unions or an opportunity to bargain over adjustments to employment terms and conditions which are a past practice of the employer. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). The decision expressly overrules the Board's decision in *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016). The decision will be applied retroactively to all pending cases.

In January of 2013, Raytheon, the employer, implemented adjustments to its medical and benefits coverage by expanding a "wellness reward" and converting a medical insurance plan into a Health Savings Account. From 2000 to 2011, the employer had implemented other changes to its medical and benefit plans annually without bargaining with the union. The union objected to the changes and alleged the employer had violated the National Labor Relations Act by unilaterally changing terms and conditions of employment without both providing notice to the union and offering to bargain over these changes. Relying upon the Board's 2016 *DuPont* decision, an administrative law judge found that Raytheon's implementation of the modifications was an illegal change of terms and conditions of employment and that the employer was obligated to negotiate with the union over those changes.

The NLRB rejected the recommended order of the administrative law judge's finding that the modifications implemented were in line with its long-standing practice and as such were merely a continuation of the status quo. The Board, relying on Supreme Court precedent, wrote that "where an employer's actions do not change existing conditions – that is, where it does not alter the status quo – the employer does not violate [the National Labor Relations Act]."

The Board was critical of the *DuPont* decision, which held any change in terms or conditions without negotiations – regardless of whether the "change" was a continuation of an established past practice – would constitute an unfair labor practice.

The Board repeated that while an employer would not be required to provide notice and offer to bargain over a long-established practice of adjusting terms and conditions of employment such as the modification of insurance benefits or wage raises, the employer remained obligated to negotiate over such changes where a union requested bargaining over announced modifications regardless of any past practice and where the modification is a mandatory subject for bargaining.

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