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Getting straight to work: NLRB overhauls three significant Obama-era priorities in one day

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It was a busy Thursday for the National Labor Relations Board (Board). First, the Board (through its current majority members—Miscimarra, Emanuel and Kaplan) followed through on its Tuesday announcement that it would publish a Request for Information in the Federal Register, asking for public input as to whether it should retain, modify, or rescind the "quickie-election" rules it promulgated in 2014. Second, the Board issued two major decisions, in which it completely upended two of the prior Board's initiatives under President Obama: (1) stricter scrutiny of the legality of employer handbook policies for unionized and nonunionized employers alike, and (2) the relaxation of the joint employment standard. Although it was all but certain that the new Board would reverse course on at least some of these issues, the newly-seated members wasted no time in doing so.

Legality of employer handbook policies

With the new majority of the Board in place, the writing was on the wall that the prior Board's aggressive application of the legal standard governing the lawfulness of workplace rules under the National Labor Relations Act ("NLRA") was on borrowed time. What is most notable about the Board's decision in *The Boeing Company*,[1] however, is that the Board did not just retreat from the prior Board's strict scrutiny of rules under its former standard; rather, it effectively "promulgated" an entirely new standard.

Under the 13-year old *Lutheran Heritage Village-Livonia* (*Lutheran Heritage*) standard,[2] an employer's rule was unlawful if it explicitly restricted activities protected by Section 7. If it did not, a violation was dependent upon a showing of one of the following: (1) employees would reasonably

[1] 365 NLRB No. 154, slip op. (rel. Dec. 14, 2017).

[2] 343 NLRB No. 75, 343 NLRB 646 (2004).

construe the language to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights.[3]

The Board, in its 3-2 *Boeing* decision, overruled the "reasonably construe" standard set forth in the first prong of the *Lutheran Heritage* test, as a result of six defects it had identified, including the test's alleged "single-minded consideration of NLRA-protected rights," without taking into account the employer's legitimate justifications or the "real-world complexities" of the workplace. The Board also echoed the past dissents of current Chairman Miscimarra, noting the recent "zeal" with which the prior Board applied the *Lutheran Heritage* test, which, in its view, led to the invalidation of "a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain," a critique shared by legions of employers in recent years.

The Board accordingly established a new test for evaluating whether a facially neutral policy, rule or handbook provision, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights. Specifically, the Board will evaluate and strike a proper balance between (1) the nature and extent of the potential impact of the policy on NLRA rights and (2) the employer's legitimate justifications associated with the rule.

The Board's majority went on to announce that, going forward, it will delineate three categories of rules, in the hopes that they will provide greater clarity and certainty to employees, employers and unions:

- *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, and thus no balancing of employee rights versus employer justification is warranted; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- *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.

Furthermore, as examples of the type of workplace rules that would fall squarely into Category 1, the Board majority referred to rules that broadly require employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace. The Board expressly overruled past cases decided under the *Lutheran Heritage* standard in which the Board held that employers violated the NLRA by maintaining these broad workplace civility policies.

While expressing agreement with the majority decision, Member Kaplan advocated for further changes to the structure of the analysis, preferring that the Board's threshold inquiry be determined by reference to the perspective of an objectively reasonable employee. In Member Kaplan's view, if that objective employee would not reasonably view a challenged rule as interfering

[3] *Id.* at 646-47.

with NLRA rights, then the need to engage in the balancing test would be moot. Member Kaplan further advocated for a fourth category that would break out rules that are found to be lawful according to this analysis.

The Board repeatedly stated that, although the maintenance of particular rules may be lawful under its new standard, the application of such rules to employees who have engaged in NLRA-protected conduct may nevertheless violate the NLRA. The Board also emphasized that, when evaluating any rule, it will focus on the interpretation of the rule from the employee's perspective.

The Board went on to apply its new standard to Boeing's "no-camera rule" that was at issue in the case before it. The Board majority found that, although the rule in some circumstances could potentially affect an employee's exercise of Section 7 rights, the risk was "comparatively slight" as the vast majority of images or videos blocked by this rule would not implicate any NLRA rights. Moreover, in the Board's view, any adverse impact was "outweighed" by Boeing's substantial and important justifications for the rule, including national security, among other things. The Board further stated its belief that these types of "no-camera rules" fell squarely into Category 1 (*i.e.*, they are the kind of rules that are lawful because their adverse impact is outweighed by the rule's justifications).

Members Pearce and McFerran vigorously dissented from the decision. Member Pearce not only criticized the new standard as "overly protective of employer interests and under protective of employee rights," he also characterized the standard as "essentially a how-to manual for employers intent on stifling protected concerted activity before it begins." In his view, the new standard lacks a rational basis, is inconsistent with the NLRA and will be impossible to apply. Member McFerran agreed with Member Pearce, and further decried the process the Board followed to achieve this result. She lamented the Board's refusal to notify the public and the parties of, or involve them in, the potential reversal of the *Lutheran Heritage* standard, calling the decision "secret rulemaking in the guise of adjudication," and "an abuse of the administrative process that leaves Board law not better, but demonstrably worse."

Going forward, the newly-announced *Boeing* standard hopefully will allow employers to cease the mental gymnastics required by the Obama-era Board's application of the *Lutheran Heritage* test, under which the employer seemingly had to conceive of every possible interpretation of a workplace rule that might potentially result in even the most minor infringement of an employee's Section 7 rights. However, given the two vigorous dissents (and the roadmaps for appeal laid out in Member McFerran's dissent specifically), Member Kaplan's advocacy for further refinement of the analytical framework and Chairman Miscimarra's tenure on the Board expiring this month, the legal landscape in this area now seems far from certain.

Joint employment standard

In *Hy-Brand Industrial Contractors, Ltd.*,[4] the Board reversed the analysis in its 2015 decision in *Browning Ferris Industries of California, Inc.* (*BFI*).[5] As discussed in a prior alert (available here), the prior Board in *BFI* abandoned the longstanding standard for joint-employer liability under the NLRA, under which an entity is only required to bargain if it exercises direct control over the terms and conditions of employment. The *BFI* standard focused on the mere ability of a company to

[4] 365 NLRB No. 156, slip op. (rel. Dec. 14, 2017).

[5] 362 NLRB No. 186 (2015).

potentially control some aspects of workers' terms and conditions of employment, regardless of whether that control was ever actually exercised.

The decision therefore established the proposition that a franchisor could be obligated to bargain with the employees of a franchisee based solely upon its potential ability to control some terms and conditions of employment, or that bargaining would be required in other similar contracting relationships. While the *BFI* Board characterized its decision as a return to traditional common law principles, the decision generated considerable uncertainty in the business community and was widely criticized. Legislative efforts to amend the standard for joint employment under the NLRA were already underway, and many expected the decision to be reversed by the Board at some point during the Trump administration.

In *Hy-Brand,* the Board wasted no time in excoriating the *BFI* Board for its expansion of the joint-employer standard. The Board referred to the *BFI* standard as "a distortion of common law," "contrary to the [National Labor Relations] Act," "ill-advised as a matter of policy," and noted that it hindered the Board's ability to discharge one of its primary responsibilities under the Act, "to foster stability in labor-management relations." The Board proceeded to delineate several major problems with the *BFI* decision, including that the prior Board exceeded its statutory authority, misunderstood the nature of the modern economy and abandoned a longstanding test which it replaced with "a vague and ill-defined standard." The vagueness and potentially unintended consequences of the *BFI* standard were a central focus of the Board, which discussed a litany of seemingly absurd scenarios which could result in a joint-employer finding.

Having thoroughly repudiated the *BFI* standard, the Board returned to the prior governing standard which had "served labor law and collective bargaining well." Under this standard, a finding of joint-employer status requires a showing that an entity actually exercised joint control over central employment terms and that this control was "direct and immediate." Additionally, joint-employer status cannot result from control which is "limited and routine," such as where an entity has the ability to dictate the work to be performed, but not how to perform that work. In the Board's estimation, this test presents "a standard that is understandable and rooted in the real world."

Perhaps ironically, the underlying facts in *Hy-Brand* played a minimal role in the Board's decision. The Board actually *affirmed* the Administrative Law Judge's decision that the entities in question were both single and joint employers, though the Board applied the restored direct control standard rather than the *BFI* standard. The parties did not even dispute the applicability of *BFI*, or urge the Board to return to the prior standard. But while the Board affirmed the Administrative Law Judge, it nevertheless opined that it had the responsibility and obligation to reconsider and reverse *BFI*.

Dissenting Members Pearce and McFerran (both of whom voted with the majority in *BFI*) criticized the Board for "rushing" to overturn *BFI,* particularly since it could have simply affirmed the Administrative Law Judge on the basis of a single-employer relationship. The dissent was particularly concerned about the swift reversal of *BFI* since the decision was presently under review by the Court of Appeals for the District of Columbia Circuit. The dissent also criticized the Board for not announcing that it planned to review and potentially overturn *BFI*, and for not soliciting *amicus* briefings or comments before returning to the prior standard.

While *BFI* was the controlling standard for only a little more than two years, the impacts of its reversal are far reaching. Companies which elected to bring certain work "in house" that they previously subcontracted to avoid the potential pitfalls of an unintended joint employer

relationship may now potentially return to their prior practices. Similarly, entities which are currently negotiating or renewing agreements with subcontractors or staffing companies may elect to expand the scope of their ability to dictate certain terms and conditions in the workplace, so long as they do not cross the line into the realm of direct and immediate control. Finally, companies in the retail and franchise arena are no longer squarely in the crosshairs of a potentially expansive joint employer standard, and can instead return to the relative certainty which guided their business relationships in the decades before *BFI*.

The labor and employment attorneys at Nixon Peabody are available to guide employers in complying with any of these newly revised standards and as the Board continues to review its prior precedents from the Obama-era. For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

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