CLIENT ALERTS & INSIGHTS

Flurry of NLRB Activity Highlighted by Board's Reversal of Browning-Ferris and Return to Prior Longstanding Joint Employer Standard Requiring Company to Exercise Direct and Immediate Control Over Workers

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The National Labor Relations Board, composed of a Republican majority for the first time in more than ten years, acted quickly to reverse the controversial 2015 *Browning-Ferris Industries* decision which had drastically expanded the Board's long established standard for determining joint employer status.

As predicted in our most recent e-alert (see Change is Coming 12.7.17) and with Chairman Phillip A. Miscimarra's term ending on December 16, the Board has been active this week while a 3-2 Republican majority remains. Next week, the Board returns to a 2-2 split and any more significant decisions will likely be delayed until a majority is restored.

Board Overturns Browning-Ferris and Returns to Direct and Immediate Control Joint Employer Test

On December 14, 2017, less than two years after rewriting and substantially loosening its longstanding test for determining if two employers can be considered joint employers in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), the Board returned to its previous standard that was in effect for over 30 years. In *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), the Board returned to its prior standard by requiring a company to exercise direct and immediate control as a prerequisite to finding joint employer status. In contrast, the short-lived standard created by *Browning-Ferris* only required a company to have indirect or potential control over workers who were otherwise employed by another entity.

Lamenting the "vague and ill-defined standard" established in *Browning-Ferris*, the Board announced its return to its prior test, which "provided certainty and predictability." The Board held that finding joint-employer status once again requires proof:

- that a putative joint employer exercised joint control, rather than merely having reserved the right to exercise control;
- that the control is direct and immediate rather than indirect; and
- that joint-employer status will not result from "limited and routine" control.

The Board emphasized that the *Browning-Ferris*

test was incorrect because entities that never exercised any joint control over essential terms and conditions of employment could nonetheless be found to be a joint employer because of the existence of "reserved" joint control, "indirect" control, or control that was "limited and routine." In *Hy-Brand*, the Board majority (the outgoing Miscimarra, joined by new Republican members Marvin Kaplan and William Emanuel) explained that it sought to recognize the practical application of the rule and clarify the analysis by signaling a "return today to a standard that has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world." The Board majority described *Browning-Ferris* as "a distortion of common law as interpreted by the Board and the courts." Importantly, the majority recognized the viability of long-standing third-party business relationships that include subcontracting, outsourcing, and temporary or contingent employment that were all jeopardized by the overbroad indirect or potential control standard created by *Browning-Ferris.*

Ironically, the Boardfound that Hy-Brand Industrial Contractors Ltd and Brandt Construction Co, are joint employers because they are both responsible for firing employees who engaged in a work stoppage. Nonetheless, presented with the joint employer question, the Board took the opportunity to return to the more stable standard in place prior to *Browning-Ferris.*

The reversal of *Browning-Ferris* is independent of, but consistent with, legislation passed by the House of Representatives and currently in the Senate to clarify the joint employer standard under the NLRA and FLSA, which we discussed in an e-alert last month (see House Passes Joint Employer Legislation 11.15.17).

Board Rewrites Standard for Analyzing Legality of Employer Rules, Handbooks, and Policies

In addition to returning to the joint employer standard that employers had relied on for years, on Thursday the Board also overturned its 2004 decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) in deciding *The Boeing Company*, 365 NLRB No. 154 (2017). In *Lutheran Heritage*, the Board had established a three-prong test for determining whether a company rule or policy is unlawful in restricting employees' Section 7 right to engage in protected concerted conduct. Under *Lutheran Heritage*, if a rule is facially neutral, the Board will nonetheless find that it violates employees' Section 7 rights if (1) employees would reasonably 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.

In The Boeing Company, the Board examined a neutral work rule under the "reasonably construe" prong of the analysis. The employer, Boeing, maintains a policy restricting the use of camera-enabled devices such as cell phones on its property. The rule does not explicitly refer to Section 7 activity, was not adopted in response to protected activity, and was never applied to restrict the activity. Nevertheless, applying the first prong of the *Lutheran Heritage* analysis, an ALJ found that the rule was unlawful because employees could reasonably construe it to prohibit Section 7 activity. The ALJ did not consider Boeing's security need for the rule. The Board stated that the ALJ decision exposed the "fundamental problems with the Board's application of *Lutheran Heritage*" and thus overturned the "reasonably construe" standard. Similar to the *Hy-Brand* decision, the Board's goal in *The Boeing Company* was to provide "greater clarity and certainty to employees, employers and unions."

Instead, the Board established a new standard: "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, two factors will be considered: (i) the nature and extent of the potential impact on NLRA rights *and* (ii) legitimate justifications associated with the rule." In applying this two-step analysis, the Board has a "duty to strike the *proper balance* between … asserted business justifications and the invasion of employee rights in light of the Act and its policy." The Board also created a new system to classify employer rules:

- Category 1: a rule is lawful because it does not interfere with Section 7 rights or is lawful because any interference is outweighed by justifications associated with the rule;
- Category 2: the Board determines that maintenance of a rule is unlawful by conducting individualized scrutiny into adverse impact upon Section 7 rights that outweighs any justifications; and
- Category 3: a rule is unlawful because it predictably has an adverse impact on Section 7 rights that outweighs any justifications.

The Board noted that the balancing in *The Boeing Company* is consistent with Lutheran Heritage, but elaborated that analysis under *Lutheran Heritage* routinely failed to give adequate weight to employer interests. In establishing the new standard, the Board expressed hope that future analysis would ensure a meaningful balancing of employee rights and employer interests.

Other Board Activity

In addition to the Board's decisions in *Hy-Brand* and *The Boeing Company* on December 14, the Board took action on two other issues earlier in the week.

First, on December 11, the Board reversed a 2016 decision that restricted ALJs from accepting a proposed settlement unless it provided a full remedy for each unfair labor practice alleged. In *UPMC and UPMC Presbyterian Shadyside*, 365 NLRB No. 153 (2017), the Board held that settlements can be accepted so long as the ALJ finds the offer reasonable and even if the charging party objects to the settlement terms. In determining what is reasonable, the Board referred to longstanding precedent established in *Independent Stave Co.*, 287 NLRB 740 (1987).

The next day, the Board asked for public comment regarding whether to revoke or change the Board's 2014 rule that accelerated the timeline for union elections, known as the "quickie election" rule. The request for comment asked for feedback on three questions:

1. Should the 2014 election rule be retained without change?
2. Should it be modified and, if so, what modifications should be made?
3. And should the rule be rescinded?

In addition, if rescission was recommended, the Board asked whether the NLRB should return to the previous rules in place prior to the 2014 rule or whether those rules should be changed. In each of the five years prior to the implementation of the 2014 quickie election rule, the median time between filing a representation case petition and an election was 38 days. In the first year under the quickie election rule, the median time was 33 days, and last year it dropped to 23 days.

Although Republican Chairman Miscimarra's term expires on December 16, Democrat Board Member Mark Gaston Pearce's term will also expire by the time the Board considers and/or acts on the public comments received. Consequently, the Board will move forward maintaining its Republican majority (2-1) at that point.

For more information on this topic, contact a member of Benesch's Labor & Employment Practice Group.

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