CLIENT ALERT: Reconstituted National Labor Relations Board Reverses Three Major "Obama Board" Precedents – By Laurence J. Donoghue

When Donald Trump was elected President in November 2016, it was widely anticipated that a newly-constituted National Labor Relations Board ("NLRB" or "Board") would act to reverse a number of policies and precedents established by the NLRB under the Obama administration.

Now that the NLRB has changed from a Democrat-majority to a Republican-majority, these anticipated changes are starting to become reality. Specifically, as 2017 drew to a close, the NLRB reversed controversial decisions of the Obama era Board as to joint employer status, handbooks and policies, and the scope of bargaining units (in particular so-called "micro-units"). The details are as follows:

1. **Joint Employer Status.** On December 14, 2017, in a case entitled *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156, the NLRB reversed the Obama-Board's 2015 decision in *Browning Ferris Industries*, which significantly expanded the concept of "joint employer" responsibility. Under *Browning-Ferris*, an entity would be deemed a "joint employer" of workers if there was indirect or potential control over workers actually employed by another entity. This expanded liability and aided union organizing in situations in which temporary or staffing agencies provided workers to another entity, or situations involving franchise operations. Under the *Hy-Brand* decision, the law returns to its pre-2015 status. Multiple entities are joint employers only if each actually exercises (as opposed to reserving the right to do so) "direct and immediate" control over a group of employees, and does so in a manner that is not "limited and routine".
2. **Policies and Handbooks.** In a decision of the same day entitled *Boeing Company*, 365 NLRB No. 154, the NLRB served notice that it would significantly alter how it evaluated policies and rules established by employers, in employee handbooks or elsewhere. Under the Obama-Board *Lutheran Heritage* standard, employer policies and rules would be invalidated even if they did not explicitly prohibit the exercise of rights under the National Labor Relations Act, if they could be "reasonably construed" by an employee to prohibit the exercise of such rights. This broad standard, in practice, led to invalidation of a number of employer rules, in particular those relating to confidentiality, workplace civility, and social media.

   Under the new *Boeing* standard, the NLRB in evaluating workplace rules will balance two factors: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. This balancing test is expected to give employers significantly more flexibility in enacting and enforcing workplace rules.

   In further explaining how it will apply this balancing test, the NLRB majority said that employer rules could be divided into three categories. Category One are rules which the NLRB will declare to be lawful, either because they do not prohibit or interfere with protected rights, or the because any potential interference is outweighed by justifications for the rules. Examples of such rules, according to the NLRB, are employer rules that prohibit taking of pictures by employees, or mandate workplace civility. In the *Boeing* case itself, the NLRB held that the Company's rule against employees taking pictures on personal cameras while at work was lawful.

   Category Two are those rules in which the NLRB will decide, on a case-by-case basis, whether the rules limit on protected conduct are outweighed by legitimate justifications.

Finally, Category Three rules are those rules which the NLRB will deem unlawful, because the interference with protected rights is not outweighed by legitimate justification directly. An example of such a rule is one which prohibits employees from discussing their salary or benefits with other employees.

As cases continue to reach the NLRB addressing workplace rule issues, it will be interesting to see which sort of rules the Board will put in each category. Further, it is important to keep in mind that even if an employer rule is not unlawful on its face, the NLRB may still find an employer violates the law if it applies the policy in a way so as to interfere with protected rights.

3. **Micro-Units.** Finally, on December 15, in a case entitled *PCC Structurals, Inc.*, 365 NLRB No. 160, the NLRB reversed its 2011 *Specialty Healthcare* decision, which had made it significantly easier for unions to organize smaller groups of employees, known as "micro-units", than had been traditionally subject to organizing under the "community of interest" standard. Under the *Specialty Healthcare* standard, if a union petitioned for an election among a particular group of employees, an employer which contended that the proposed unit wrongly excluded other employees would be required to demonstrate that the smaller group had an "overwhelming" community of interest with the larger unit. If the employer did not meet this burden, the union could organize the smaller group.

   Under the *PCC Structurals* test, the Board announced that it will revert to the prior "community of interest" test, that had governed bargaining unit decisions for decades before the *Specialty Healthcare* decision. Also, the burden is no longer on the employer to present "overwhelming" evidence of a community of interest with a larger group when a union seeks to organize a smaller group.

   The above decisions may well be the leading edge of a surge of NLRB rulings re-examining precedents and rulings of the Obama-Board. Because these changes in doctrine are quite new, the practical ramifications are not immediately clear. Certainly for employers that may be concerned about union organizing activity, the re-tightening of the joint employer standard and the elimination of organizing on a micro-unit basis are welcome developments. However, for the majority of employers (whether union or non-union) the most impact, on a practical basis, will be the change in the standard as to how workplace rules and policies will be evaluated. Over the past few years, to comply with the ever-restrictive requirements of several decisions of the Obama-era NLRB, employers have been revising their handbooks in significant ways, by either eliminating prior policies, or watering them down considerably. It may well be worth another look at those handbooks/policies to see if they can be revised without fear that the NLRB will deem them to be overbroad so as to chill employee rights.

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