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NLRB Reverses Course on Employee Handbooks, Joint Employers, and More

Last week, the National Labor Relations Board (the "NLRB" or "Board") issued four significant decisions reversing precedent under the National Labor Relations Act (the "NLRA" or "Act") governing the legality of employee handbooks and employment policies, joint employment relationships, employers' ability to unilaterally change terms and conditions of employment in accordance with a past practice, and the unionization of small bargaining units of employees (called "micro-units"). The decisions mark the end of Chairman Philip Miscimarra's tenure on the Board and – with two of the Board's five members dissenting in each case – it appears that further substantial changes to Board precedent will be unlikely while his seat remains vacant.

Employee Handbooks

In *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), the Board overturned its 2004 decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that an employer's handbook policies or work rules violate the NLRA if employees "would reasonably construe" a rule to prohibit activities that are protected by the Act. *Boeing* adopts a more flexible approach, providing that – if a policy or rule could reasonably be interpreted to interfere with NLRA-protected activity – the Board will analyze both the employer's legitimate justifications for the rule and the nature and extent of the rule's potential impact on protected activity to determine whether it is lawful. Rules that could reasonably be read to restrict protected activity will nonetheless be permissible if the Board agrees that the employer's justifications for the rule outweigh the potential adverse impact on NLRA-protected rights. Applying this test to Boeing's policy restricting photography and video-recording on its property, the Board held that the company's rule was lawful given Boeing's interests in complying with legal and contractual obligations, protecting classified information and employee privacy, and maintaining the security of its facilities. Given the employer's carefully articulated and substantiated concerns about terrorism, corporate espionage, and national security, the potential infringement of its camera ban on employees' legally protected rights was comparatively slight.

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The Board further announced that, going forward, it would attempt to provide greater guidance to employers, employees, and unions struggling to interpret and apply workplace policies by categorizing policies as: (1) generally lawful, either because they would not reasonably be interpreted to interfere with NLRA rights or the potential adverse impact is outweighed by justifications for the rule (citing Boeing's no-camera policy and rules requiring "harmonious interactions and relationships" in the workplace); (2) warranting individualized scrutiny based on the circumstances; or (3) unlawful because they prohibit or limit NLRA-protected activity without adequate business justifications (citing policies prohibiting employee discussion of wages and benefits with one another). The Board further suggested that these distinctions may vary based on the industry and work setting, the weight of an employer's interests in maintaining a given rule, and type(s) of protected activity impacted by the rule. Policies adopted in response to NLRA-protected activities or that expressly restrict such activities, or otherwise lawful policies applied by an employer to restrict protected activity, remain unlawful under existing precedent.

Joint Employers

In *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) the Board overturned its controversial decision in *Browning Ferris Industries of California*, 362 NLRB No. 186 (2015) and reaffirmed the traditional test for determining whether two companies are joint employers of the same workers. *Browning Ferris* significantly expanded joint employer liability under the NLRA by holding that a company could be deemed a joint employer of another's workers if it indirectly controlled, or merely reserved the right to control, the workers' terms and conditions of employment. *Browning Ferris* created significant uncertainty for businesses operating through certain relationships (such as contractors and subcontractors, franchisors and franchisees, or parents and subsidiaries) about whether and to what extent they could be required to recognize and bargain with a union that represents the employees of a business affiliate.

As a result of *Hy-Brand*, the Board will again apply the joint employer analysis derived from common law agency principles that had been in place before Browning Ferris. Under this standard, a joint employment relationship will generally exist when: (1) two companies have actually exercised joint control over essential terms and conditions of workers' employment (e.g., hiring, firing, discipline, supervision, and direction); (2) the putative joint employer's control is both direct and immediate; and (3) this control is not limited and routine. While *Hy-Brand* provides additional clarity to companies regarding their labor relations obligations, this will not abate the panoply of other joint employment standards that may apply to other aspects of the employment relationship. For example, the Equal Employment Opportunity Commission has historically taken a broad approach to joint employer determinations, and filed a brief as amicus curiae supporting the Board's *Browning-Ferris* standard in a previously-pending appeal of that decision (now remanded for reconsideration).

Past Practices

An employer usually risks violating the NLRA when it makes a unilateral change to union-represented employees' terms and conditions of employment (if they are mandatory subjects of collective bargaining) without giving the union advance notice and an opportunity to request bargaining over the decision. The employer may be able to avoid liability, however, absent unusual circumstances, if it can show a regular and consistent past practice of unilaterally making similar changes (among other exceptions). Last year, in *E.I. du Pont de Nemours & Co.*, 364 NLRB No. 113 (2016) ("*DuPont*"), the Board jettisoned decades of precedent and drastically limited employers' ability to establish such a past practice. In particular, the Board held for the first time in *DuPont* that past practices sanctioned under a collective bargaining agreement ("CBA") could not persist beyond the expiration of the CBA, nor could any practice involving the exercise of employer discretion.

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017), the Board set aside *DuPont* and returned to the traditional past practice analysis that, broadly, considers adherence to past practice in terms of whether the employer's actions are similar "in kind and degree" to what it has done in the past. Applying this standard, the Board ruled that Raytheon did not violate the Act by updating its existing health benefits plans without consulting the union, because it had made such changes annually for over a decade; the expiration of the parties' CBA and the employer's exercise of discretion in determining the precise changes from year to year, which were impediments under *DuPont,* did not warrant a contrary outcome. However, the Board's decision does not relieve employers of the obligation to bargain with unions – upon request – over mandatory subjects of collective bargaining, regardless of whether the employer has a past practice of unilaterally making similar changes absent a current CBA or valid waiver.

Micro-Units

In *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) the Board overturned *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), which had empowered unions to organize small segments of an employer's workforce that sometimes bore little relation to the company's operational structure. *Specialty Healthcare* gave significant deference to a union's petitioned-for bargaining unit, requiring only that it be composed of a readily identifiable group of employees who shared a community of interest, and requiring employers insisting on the inclusion of other employees in the bargaining unit to prove that the excluded employees had an "overwhelming" community of interest with the proposed bargaining unit and that there was no legitimate basis for excluding these workers from the unit.

PCC Structurals reverts to traditional "community of interest" standards for determining whether a proposed bargaining unit is appropriate, under which the Board assesses whether the differences between employees who have been included in and excluded from the bargaining unit outweigh their similarities. This analysis calls for consideration of whether employees: are organized into separate departments; have distinct skills or training; have distinct functions or work (including the amount and type overlap); are functionally integrated with other employees; have frequent contact with other employees; exchange roles with other employees; have distinct terms and conditions of employment; and are separately supervised. In addition, the Board noted that other recent decisions applying *Specialty Healthcare* and deviating from industry-specific rules for delineating appropriate bargaining units (for example, in the retail industry) were no longer binding precedent.

These decisions, taken together, will likely provide employers with greater flexibility in labor relations while permitting the Board to fashion more nuanced protections of employee rights, but will also require employers to reacquaint themselves with novel or former legal standards. If you have any questions or would like more detailed information about these decisions, please contact Nick Bauer at (212) 758-7793 or any other attorney at the firm.