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Alert | Labor & Employment

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NLRB Overturns 4 Decisions that Adversely Impacted Employers

Just this month, the National Labor Relations Board (NLRB or the Board) successively overturned four decisions that adversely impacted employers and were made while President Obama was in office. The earlier decisions expanded the definition of "joint employer"; scrutinized neutrally-worded work rules; required employers to notify and provide an opportunity to bargain to unions prior to taking actions (even if those actions were consistent with an established past practice); and, shifted the burden to employers to prove that employees should be included in a group of employees in an appropriate unit (or election group) as opposed to using the community-of-interest standard and as a consequence allowing unions to determine the unit based on the union's extent of organization.

On Dec. 1, 2017, – after being sworn in as NLRB General Counsel – Peter Robb issued a memo to all regional directors requiring them to submit to the Division of Advice cases involving "significant legal issues," which include "cases over the last eight years that overruled precedent and involved one or more dissents" where the General Counsel "might want to provide the Board with an alternative analysis." The General Counsel's memo, among other proposed changes, specifically listed three of the four cases overturned this month: *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery* (the "joint employer" standard, overruled in *Hy-Brand Industrial Contractors, Ltd.*); *Lutheran Heritage* (work rules prohibiting the use of cameras or recording overruled in *Boeing*); and *E.I. Dupont de Nemours* (unilateral changes consistent with past practice, overruled in *Raytheon*). Also overturned was the *Specialty Healthcare* standard (the union's "extent of organization" and "overwhelming" community of interest standard, overruled in *PCC Structurals, Inc.*).

The *Browning-Ferris* Standard

The Board in *Hy-Brand* restored the definition of independent contractor consistent with Section 2(3) of the Act, which expressly excludes "independent contractors" from the definition of "employees" covered by the Act and also in a manner consistent with the Department of Labor's withdrawal of two earlier memos that similarly established expansive definitions of joint employers and independent contractors under the Fair Labor Standards Act (FLSA). In *Hy-Brand Industrial Contractors,* the Board overturned the "joint employer" test set forth in *Browning-Ferris*. The Board described the *Browning-Ferris* standard as refusal to follow the Congressional Amendment to the NLRA, "specifically excluding any individual having the status of an independent contractor from the definition of 'employee covered in Section 2(3) of the Act'" and a distortion of common law, ill-advised as a matter of policy, and one whose application prevented the Board from fostering stability in labor-management relations. *Browning-Ferris* had allowed a "joint employer" finding 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 "joint employer" test under *Hy-Brand* shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having "reserved" the right to exercise control, the control must be "direct and immediate" rather than indirect), and joint-employer status will not result from control that is "limited and routine."

The *Lutheran Heritage* Standard

The Board in *Boeing* overturned the *Lutheran Heritage* standard because the Board found it "prevent[ed] the Board from giving meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules, and handbook provisions." Employers now have more leeway in enacting work place rules even if they have an adverse impact on employees' Section 7 rights. The *Lutheran Heritage* standard allowed facially-neutral work rules to be found unlawful, if employees would "reasonably construe" the language to prohibit Section 7 activity. The new *Boeing* standard adopted by the Board requires the Board to evaluate two standards when evaluating facially neutral work rules that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The Board went further by delineating three categories of work rules. The first category includes 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 the NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. The second category includes work rules that warrant individualized scrutiny in each case to determine 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. The third and last category includes work 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.

The *E.I. Dupont de Nemours* Standard

The Board in *Raytheon Network Centric Systems* overturned *E.I. Dupont de Nemours* (*DuPont)* and reversed an administrative law judge's ruling, that *Raytheon* unlawfully adjusted employee healthcare benefits without union permission notwithstanding the fact that the employer had enacted similar changes every year for the last 12 years. *Raytheon* enables employers again without bargaining to make changes consistent with the parties' past practice irrespective of whether the applicable collective-bargaining agreement is expired or employer discretion is involved. *DuPont* required employers to notify and provide unions with an opportunity to bargain over changes, even if they were past practice, if such past practice was created under a management-rights clause in an expired collective-bargaining

agreement, or if the actions involved employer discretion. The Board, in *Raytheon*, described the holding in *DuPont* as fundamentally flawed, inconsistent with Section 8(a)(5) of the Act, distorting the long-understood, commonsense understanding of what constitutes a "change," and a contradiction to well-established Board and court precedent.

The *Specialty Healthcare* Standard

Finally the Board in *PCC Structurals, Inc.* reclaimed its statutory duty to determine whether a proposed unit is appropriate when a party seeks to expand the unit. This appeared to be pursuant to a general introductory statement in the General Counsel's memo – stating that the "extant" provisions of the NLRA will be followed. The Board in *PCC Structurals, Inc.* overturned *Specialty Healthcare*, which required employers to show that employees they wanted to include in a unit shared an "overwhelming" community of interest with the union's petitioned-for unit. The Board reasoned that the standard in *Specialty Healthcare* improperly detracted from the Board's statutory responsibility to make "appropriate bargaining" unit determinations and not base such units solely on the extent of union organization. The Board reinstated the old standard: the Board will no longer be restrained by the extraordinary deference that *Specialty Healthcare* afforded the petitioned-for unit when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit. Rather, applying the Board's traditional community-of-interest factors, the Board will determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit. The Board may find that the exclusion of certain employees renders the petitioned-for unit inappropriate even when excluded employees do not share an "overwhelming" community of interest with employees in the petitioned-for unit.

Going Forward

It is expected by many that the Board will likely continue to tip the balance in favor of employers in the near future. The General Counsel's Dec. 1, 2017, memo describes several other cases and their subjects that are subject to consideration to "an alternative analysis" and most likely reversal, such as *Fresh & Easy Neighborhood Market* (this case is listed under "Concerted activity for mutual aid and protection where only an employee had an immediate stake in the outcome" and described as an "individual sexual harassment claim"), *Purple Communications* (this case is described as "finding that employees have a presumptive right to use their employers' email system to engage in Section 7 activities"), and *Pier Sixty* (this case is also listed under "concerted activity for mutual aid and protection" and described as "[f]inding no loss of protection despite obscene, vulgar, or other 'highly inappropriate content'"). At the top of the list is *Fresh & Easy Neighborhood Market,* in which the Board found that an employee engaged in protected concerted activity when she asked her coworkers for assistance in preserving evidence for a sexual harassment complaint she planned to raise with her employer. In *Purple Communications*, the Board held that employees have a presumptive right to use their employer's email system to engage in Section 7 activities. In *Pier Sixty*, the Board found that an employee did not lose the Act's protection despite posting a derogatory comment about his supervisor while encouraging his co-workers to vote for the union in an upcoming election.

By including *Fresh & Easy Neighborhood Market* in its Dec. 1, 2017 memo, the General Counsel, brought the Board into the national debate concerning sexual harassment. Senator Elizabeth Warren sent General Counsel Robb an information request asking him to explain, among many other things, the reason why he said he "might want to provide the Board with an alternative analysis" in complaints supported by the Board's decision in *Fresh & Easy Neighborhood Market*. Senator Warren also asked whether he believes workplace sexual harassment is a rare occurrence. It appears that General Counsel Robb has not yet responded to Senator Warren's inquiry, but his response is expected to shed light on whether he will move

forward with overturning *Fresh & Easy Neighborhood Market*. In *Hy-Brand*, the Board articulated an underlying commitment to not impose policy rules that may be inconsistent with, or controlled by, requirements of another federal statute that is unrelated to labor relations. ("The Board has been repeatedly reminded that it has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly, that [we] may wholly ignore other and equally important Congressional objectives"; *Southern Steamship Co. v. NLRB*, 316 US 31, 47 (1942); *Hy-Brand* at 28.)

The NLRA was a Congressional enactment to enable and govern labor and management recognition of employee majorities and collective bargaining negotiations and agreements, as the Board noted. *Hy-Brand*, at 5 ("It is implicit in the entire structure of the Act that the Board is to oversee and referee the process of collective bargaining leaving the results of the contest to the bargaining strengths of the parties. *H.K. Porter Co. v. NLRB,* 397 US 99, 107-108 (1970)."). The Seventh Circuit explained in *Rakestraw v. United Airlines,* 981 F.2d 1524 (7th Cir. 1992) that:

> Negotiation means compromise. Neither employees as a whole nor particular groups of employees emerge from bargaining with all their wants satisfied. Often unions can achieve more for some of their constituents only by accepting less for others. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953). See also *Humphrey v. Moore,* 375 U.S. 335, 349-50, 84 S.Ct. 363, 372, 11 L.Ed.2d 370 (1964).

As also explained in *Rakestraw, supra*: "Bargaining has winners and losers. See *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971)." The result may mean that a better retirement plan and other deferred compensation assists older workers at the expense of younger ones, who prefer cash to cover current expenses. Accepting lower fringe benefits (less health insurance, fewer days off) in exchange for higher cash wages may assist the majority at the expense of the sick and those whose religious faith requires them to take extra days off. Higher wages may assist those who remain working at the expense of workers who may be laid off when the employer loses business to its competitors. Reducing the difference between the wages of skilled and unskilled workers may assist the less skilled, who also tend to be more numerous. In *Rakestraw* the decision noted: "the union knows who wins and who loses." However, *Rakestraw* concluded:

> "The losers always may say that the union "intended" them to lose. As all of society is an assembly of minorities, the losers can point to some respect (age, sex, religion, politics, skill, health, membership in the union, status during the most recent strike) in which they are in a minority, and insist that the distinction must have been part of a "bad faith" plot to "penalize" them on account of that status. Taken to its limits, the approach prevents the union from resolving differences internally and representing the interests of workers as a group. Yet one of the premises of the Railway Labor Act (like the National Labor Relations Act), and a requirement of the Labor-Management Reporting and Disclosure Act, is that unions act democratically to reach a collective decision — the majority is entitled to prevail. [Emphasis added.] *Humphrey*, 375 U.S. at 349-50, 84 S.Ct. at 372; *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203, 65 S.Ct. 226, 232, 89 L.Ed. 173 (1944)."

Conclusion

The Board and the General Counsel appear to be affecting the Board's power to expand the NLRA, which grew during the previous administration and impacted nonunionized workplaces.

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