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THE NLRB PENDULUM HAS SWUNG

In our October 11, 2017 Employment Law Alert, *The NLRB Pendulum Is About to Swing*, we indicated that with a Republican majority for the first time in over decade, the National Labor Relations Board was poised to overturn a number of "labor-friendly" cases that were decided during the Obama Administration. That process was set in motion on December 1, 2017, when new NLRB General Counsel Peter Robb issued GC Memorandum 18-02 (the "Memorandum"), setting out a broad agenda to revisit many Obama-era decisions. The Memorandum instructed the Board's Regional Offices to seek "alternative analysis" from the NLRB's Division of Advice on a range of issues before issuing Complaints, including on matters involving joint employer status, employee handbook rules, and more.

Last week, the reversals began – and since then, the Board has issued five new cases, all decided by a 3-2 majority along party lines. The latest decision came in just under the wire before Republican appointee Board Chair Miscimarra's term expired on Saturday, December 16. While the NLRB pendulum will continue to swing, we may see a short lull until a new Board member is confirmed to replace Chair Miscimarra.

In the meantime, here's an overview of the new reversals.

Joint Employer Test

In *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156, the Board jettisoned the controversial *Browning-Ferris* joint employer test that the Board adopted in 2015. Under that test, a company could be considered a joint employer with another company if it had the contractual right to control the terms and conditions of employment of the other company's employees, even if that control was never exercised. The new decision returns to the Board's earlier standard that two companies will be considered joint employers if the right to control was *actually* exercised and it involved direct and immediate control, not indirect and routine control.

New Test for Workplace Rules

In *The Boeing Co.*, 365 NLRB No. 154, the Board has issued a new test for evaluating when a facially neutral policy, work rule, or employee handbook provision would potentially interfere with employees' exercise of protected rights under the National

SF Office
111 Sutter St.
Suite 700
SF, CA 94104
t 415.464.4300
f 415.464.4336

LA Office
11845 W. Olympic Blvd.
Suite 910W
LA, CA 90064
t 310.943.8500
f 310.943.8501

millerlawgroup.com

Labor Relations Act (NLRA). The Board's new test evaluates two elements: (1) the nature and extent of the potential impact on NLRA rights; and (2) the employer's legitimate justifications for the rule. The new test replaces the Board's *Lutheran Heritage* test, which focused on whether employees would "reasonably construe" the rule to prohibit exercise of NLRA rights. In *Boeing*, the Board reasoned under the new test that while Boeing's no-camera rule potentially affected the exercise of NLRA rights, the impact would be comparatively slight and outweighed by important justifications, including national security concerns. According to the Board, an example of an unlawful rule under the new test would be a prohibition on discussion of wages and benefits, as the rule would limit NLRA-protected activity and would not be outweighed by justifications associated with the rule.

Reasonable Settlement Terms

In *University of Pittsburgh Medical Center*, 365 NLRB No. 153, the Board has overruled a case decided last year where a divided Board rejected the past practice of allowing an Administrative Law Judge to accept a respondent's proposed settlement terms over the objections of the General Counsel and the charging party when the proposed terms met the "reasonableness" standard that had been established by the Board in 1987. The 2016 decision held that when the General Counsel and the charging party objected to a proposed settlement, the Judge could not accept it unless its terms provided a full remedy for all violations alleged in the complaint. The Board's new decision reestablishes the Judge's authority to accept a proposed settlement over the General Counsel and charging party's objections if its terms meet the Board's long-standing "reasonableness" standard, which includes a determination that the settlement would provide employees a substantial benefit.

Challenging a Petitioned-For Unit

In *PCC Structurals, Inc.*, 365 NLRB No. 160, the Board has overruled its 2011 decision in *Specialty Healthcare,* which had made it difficult for an employer to successfully challenge a union's description of the appropriate unit for representation. Under *Specialty Healthcare,* the Board would not find the petitioned-for unit inappropriate unless the employer could prove that the excluded employees shared an "overwhelming" community of interest with the petitioned-for group. The Board stated in *PCC Structurals, Inc.* that "there are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees – both those within and those outside the petitioned-for unit – without regard to whether these groups share an 'overwhelming' community of interests."

Reliance on Past Practices

In *Raytheon Network Centric Systems*, 365 NLRB No. 161, the Board has overruled a

case decided last year which held that actions consistent with an established past practice constitute a change and require an employer to provide the union with notice and an opportunity to bargain over the change before it's implemented. The new *Raytheon* decision holds that consistent with other Board cases dating back to 1964, actions don't constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. And under those circumstances, the actions don't require either notice to the union or the opportunity to bargain over the change before it is implemented.

What's Next

The General Counsel's recent Memorandum is available here. It may well predict future changes in the Board's current rules and cases; however, as stated above, those changes will likely be on hold until a new Board member is confirmed as a result of the December 16, 2017 expiration of Chair Miscimarra's term. For the time being, employers can breathe a sigh of relief, and we'll keep you apprised of any further changes in the Board's rules and cases.

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