NLRB Reverses Four Obama-Era Decisions

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Board Member Philip Miscimarra’s term on the National Labor Relations Board (NLRB) expired last week with a bang rather than a whimper. In the final days of his tenure, the Board reversed four controversial Obama-era decisions addressing joint employers, workplace policies, micro-units, and the duty to bargain. These decisions, summarized below, will impact all employers, not just those with unionized workforces. Although the Board now returns to a 2-2 Republican to Democrat split as a result of Miscimarra’s departure, once his Republican replacement is confirmed employers should expect to see more decisions on the chopping block.

1. Return to Joint Employer Standard of “Direct Control”

Actual exercise of control is now necessary for a finding of joint employment status—not just the right to exercise control. In 2015, the board decided in *Browning-Ferris* that an entity could be found to be a joint employer if it merely had indirect or potential control over individuals who were formally employed by another entity. The *Browning-Ferris* case, decided while Democrats had a majority on the Board, had overruled more than 30 years of precedents holding that a finding of joint employment required direct and immediate control over a group of employees.

But now with the *Hy-Brand Industrial Contractors, Ltd.* decision, it is clear that the Board is going back to its previous standard of direct control as articulated in the majority opinion:

“A finding of joint-employer status 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.”

This is a welcome relief for many employers, especially those with leased employee staffing arrangements or franchisor-franchisee models, who were facing increased scrutiny from the prior Board and General Counsel Dick Griffin under the *Browning-Ferris* standard.

2. New Standard for Evaluating Workplace Policies

Employer justifications will now be considered in addition to potential impact on National Labor Relations Act (NLRA) rights in determining lawfulness of employer policies. In its decision in *The Boeing Company*, the Board also overturned its *Lutheran Heritage Village-Livonia* standard for determining the legality of employer rules or policies, such as those prohibiting the use of cameras in the workplace or barring employees from criticizing supervisors on social media.

Under the *Lutheran Heritage* standard, a policy would be found to be illegal if an employee could “reasonably construe” that the policy prohibited him or her from exercising rights protected by the NLRA. Critics of the standard argued that it emphasized employee rights too much, while minimizing the reasons why an employer created the rule or policy in the first place. They also said the standard caused confusion among employees, employers, and unions as to whether such rules or policies were legal or illegal, and was used by the NLRB to render illegal many legitimate employer policies.

In its decision *The Boeing Company*, the Board majority agreed. Under the *Boeing* standard, the Board will consider not only the nature and extent of the challenged rule’s potential impact on employee rights protected by the NLRA, but also the “legitimate justifications” associated with the employer’s rule. In the majority’s view, this new standard will allow the Board to give “…meaningful consideration to the real-world ‘complexities’ associated with many employment policies, work rules and handbook provisions.”

3. Hard for Unions to Organize Micro-Units

The Board also has reversed its position on micro-units. On December 15, 2017, the Republican-led Board reversed its 2011 decision in *Specialty Healthcare*, which allowed unions to petition for “micro-units.” Under *Specialty Healthcare*, the burden was on the employer to show that the employees in the proposed expanded unit shared an “overwhelming community of interest.”

However, in *PCC Structurals, Inc.*, the Board concluded that *Specialty Healthcare* standard was “fundamentally flawed.” Instead, the “traditional community-of-interest standard,” which the Board had utilized for decades, was more appropriate. Under the traditional standard, the Board is required to determine “whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” This permits the Board to evaluate the interests of all employees — not just those in the union’s petitioned-for unit.
In its decision, the Board also clarified that at no point does the burden shift to the employer to prove an overwhelming community of interest.

4. Duty to Bargain

The Board also restored a 50-year-old precedent regarding an employer’s obligation to bargain with a union over unilateral changes made after a collective bargaining agreement has expired. This decision in Raytheon Network Centric Systems reversed its 2016 ruling in E.I. du Pont de Nemours (or DuPont).

In DuPont, the Board had held that once a contract between a union and employer expires, an employer is prohibited from making unilateral changes without providing notice and the opportunity to bargain with the union. The DuPont decision extended the duty to bargain to changes that were consistent with the employer’s past practice. The Board also had held in DuPont that employers were always obligated to bargain with a union if the change involved any exercise of the employer’s “discretion.” The DuPont decision overturned the Board’s 1964 decision in Shell Oil Co.

In Raytheon, the Board restored its holding in Shell Oil Co, and held that employers have no obligation to bargain with the union over a unilateral change after the contract between the parties expires, so long as the change is consistent with past practice. This is because “an employer’s past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.”

The flurry of decisions issued just prior to Miscimarra’s departure signals a sharp departure from a Board that many employers considered to have greatly exceeded its authority over the past eight years.

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