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NLRB Issues Two Landmark Decisions: Return to Original Joint-Employer Standard & New Handbook Policy Review Standard

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On December 14, 2017, the National Labor Relations Board (the "Board") issued two landmark decisions. Both are of note because they directly and substantively address two issues that have vexed employers for a number of years: (1) When can two separate and distinct corporate entities be treated as joint-employers for NLRA purposes? and (2) When is a work rule or handbook policy unlawfully overbroad under the NLRA?

As to the first question, the Board re-adopted the common law test which focuses on whether the purported employer has "direct and immediate" control over the employees. As to the second question, the Board created a new test that requires a greater degree of balancing between the protections of the Act and the employer's legitimate business interests, directly overturning the *Lutheran Heritage*standard.

The Board re-adopts the "direct and immediate control" test for joint-employer status.

In *Hy-Brand Indus. Contractors*, the Board abandoned the "economic realities" test for determining joint-employer status for NLRA purposes and re-adopted the "direct and immediate control" test that was in place prior to the *Browning-Ferris*decision. In doing so, the Board stated:

> [T]he *Browning-Ferris*majority opinion did not represent a 'return to the traditional test used by the Board,' . . . Rather, the *Browning-Ferris* joint-employer test fundamentally altered the law applicable to user-supplied, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. . . . For all these reasons, we return today to pre-*Browning-Ferris* precedent. Thus, 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 the joint-employer status will not result from control that is 'limited and routine.' *See*Hy-Brand Industrial Contractors, Ltd., Case No. 365 NLRB No. 156, pg. 5 (Dec. 14, 2017).

Prior to the 3-2 Board decision in *Hy-Brand*, the *Browning-Ferris*standard allowed for a finding of joint employer under the NLRA even where there was no showing of a company's exertion of any control over the other's workers' terms and conditions of employment. The decision to overrule precedent and return to the direct and immediate control standard will provide some relief for employers on NLRA joint employer issues.

The Board abandons the "could reasonably construe" standard and implements a comprehensive balancing standard.

In *Boeing Co and SPEA*, the Board abandoned the *Lutheran Heritage Village-Livonia* standard for determining whether a work rule or handbook policy is unlawfully overbroad and implemented a more nuanced test that requires a balancing of the employer's legitimate business interests with the employees' Section 7 rights:

> "Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and*(ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's 'duty to strike a *proper balance* between . . . asserted business justifications and the invasion of employee rights

AUTHORS

- Brian Peterson

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- Paul D. Satterwhite
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in light of the Act and its policy,' focusing on the perspective of employees, which is consistent with Section 8(a)(1). As a result of this balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions . . . :" *See Boeing Company and SPEA*, 365 NLRB No. 154, pg. 3. (December 14, 2017).

The decision also sets out three categories or classifications of rules: (1) Category 1: rules that the Board designates as lawful. These rules either cannot be reasonably interpreted as prohibiting or interfering with the exercise of NLRA rights or any interference with workers' rights is outweighed by business justifications associated with the rule; (2) Category 2: rules that warrant individual scrutiny. This category requires determination of whether the rule interferes with NLRA rights and whether the adverse impact is outweighed by legitimate business interests; and (3) Category 3: rules that are always unlawful. These rules interfere with NLRA rights in a way that cannot be outweighed by legitimate business interests.

Key Takeaways

- For NLRA purposes, employers are now subject to a more favorable standard for determining whether they can be considered a joint-employer for a particular group of workers.
- The Board is now required to engage in a more nuanced analysis when it is determining whether a facially neutral work rule or employee handbook policy is unlawfully overbroad under the NLRA.

This blog post was drafted by Brian Peterson. He is an Associate in the Kansas City, MO office of Spencer Fane LLP. For further information, please visit www.spencerfane.com.