DECEMBER 26, 2017

# THE NATIONAL LABOR RELATIONS BOARD CONCLUDES 2017 WITH SEVERAL GIFTS TO EMPLOYERS

The National Labor Relations Board ("NLRB") recently shifted to a Republican majority when President Trump's two nominations to the Board were confirmed. Additionally, the president's nomination for general counsel of the NLRB, a former management-side labor law attorney, was sworn in on November 17, 2017. The new Board has hit the ground running and has issued several precedential opinions in recent weeks, overturning some controversial rulings issued by the Board under President Obama. These decisions will have an effect on several aspects of the employment relationship moving forward. Below is a summary of the most impactful recent rulings for employers.

*Handbook Rules.* For years, we have reported on the multitude of decisions from the Board striking down employer handbook rules. Many of these decisions were based on a standard set forth in the *Lutheran Heritage* case, which provided, in part, that a rule or policy maintained by an employer is unlawful if "employees would reasonably construe the language to prohibit any activity protected by the National Labor Relations Act." On December 14, 2017, the Board overruled *Lutheran Heritage* and discarded the "reasonably construe" test for analyzing employer rules and policies. In its place, the Board explained that when evaluating an otherwise neutral policy, it will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights; *and* (ii) legitimate justifications associated with the rule. The Board noted that the new standard will provide greater clarity for employees and employers and allow for more flexibility to balance business justifications and employee rights. In applying its new test, the Board upheld a "no-camera" rule maintained by Boeing.

*Joint Employer.* In the *Browning-Ferris* ruling, the previous Board held that two entities could be joint employers based on the existence of indirect control or "reserved" joint control, even when the two entities had never actually exercised joint control over terms and conditions of employment. On December 14, the Board overruled the controversial standard in *Browning-Ferris.* The Board returned to the standards and principles governing joint employment that existed prior to the *Browning-Ferris* decision. Now, the Board will focus on whether an alleged joint employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction. An essential element in the analysis is whether a putative joint employer's control over employment matters is direct and immediate.

*Micro-Units.* In the prior *Specialty Healthcare* decision, the Board created a standard for determining the appropriateness of a unit petitioned for by a union that permitted the organization of "micro" bargaining units throughout an organization. The standard also provided the union with significant latitude to target smaller groups of employees where it had enough support for a petition. On December 15, the Board overruled the standard set forth in *Specialty Healthcare.* The Board returned to its traditional community-of-interest test in which the Board will determine whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit.

*Unilateral Changes.* Where employees are represented by a labor organization, Supreme Court precedent requires employers to refrain from making a *change* in mandatory bargaining subjects unless the change is preceded by notice to the union and the opportunity for bargaining regarding the planned change. In 2016, the Board issued a decision that altered what constitutes a "change" in terms and conditions of employment. The 2016 decision required notice and opportunity in cases where an employer continued to do precisely what it had done many times previously and also held that bargaining would always be required, in the absence of a collective bargaining agreement, in every case where the employer's actions involved some type of "discretion." On December 15, the Board overruled the 2016 decision and returned to its previous precedent regarding unilateral change, explaining that conditions of employment are to be viewed dynamically and that the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change. An employer modification consistent with such a pattern is not a "change" in working conditions at all.

**PRACTICAL TAKEAWAYS**

The handbook decision will have an impact on the analysis of all employee rules and policies going forward and may validate several employer policies previously held to be unlawful, including rules requiring employees to be "civil" and "respectful." The joint employer decision may impact several types of business relationships including franchisee relationships, subsidiary relationships and the use of leased

labor or third party staffing companies. The micro unit case will surely affect future union organizing efforts and the unilateral change decision will provide unionized employers more latitude in future decision-making.

These decisions and the accompanying restoration of previous precedent on these matters are well received gifts for employers, though the litigation of these cases is likely to continue. The decisions came down so close together because Philip Miscimarra's (one of the Republican members of the Board) term expired on December 16. Mr. Miscimarra has declined consideration for a second term and nobody has been nominated by President Trump to fill the recent vacancy, leaving the current Board with a partisan split at 2-2. Thus, while we can expect more employer-friendly decisions from the Board under President Trump, it will likely have to wait for another nomination and confirmation to fill the current vacancy. We will continue to monitor developments regarding these issues.

If you have any questions or would like additional information, please contact:

- Bruce Bagdady at (248) 457-7839 or bbagdady@hallrender.com;
- Brad Taormina at (248) 457-7895 or btaormina@hallrender.com; or
- Your regular Hall Render attorney.