NLRB's Pendulum Swings, Twists and Turns

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Body

IN LATE SEPTEMBER 2017, the National Labor Relations Board obtained a Republican majority for the first time in a decade. As labor law practitioners recall, the final days of 2017 were marked by the board's significant efforts to reverse key principles established under the administration of President Barack Obama and bemoaned by the business community. We summarize key initiatives below.

Joint Employer Test

The new board majority restored the joint employer test as it existed before *Browning Ferris Industries of California, Inc., 362 NLRB No. 186 (2015)*. In Browning-Ferris, the Board announced that it would find a joint employer relationship based on (1) indirect conduct by one company affecting the terms and conditions of employment of an unrelated company's employees; and (2) retained but unexercised control contained in service contracts, franchise agreements and the like, between otherwise unrelated companies. Concerning to employers, this had the potential of substantially increasing the types of business relationships that could create a joint employer relationship.

On Dec. 14, 2017, the board returned the joint employer test to the version that existed for decades before Browning Ferris, holding that: (1) joint employer status would not be found in the absence of direct and immediate control exercised over another employer's employees; and (2) even then, joint employer status would not be found where such control was limited and routine and not accompanied by any other normal indicia of employment, such as the ability to hire, fire or discipline. *Hy-Brand Industrial Contractors, LTD, 365 NLRB No. 156 (2017)*.

On Feb. 26 of this year, however, the board entered an order vacating the Hy-Brand decision based upon the board's Designated Agency Ethics Official conflicts determination that board member William Emanuel's participation in Hy-Brand may affect the pending appeal of Browning Ferris, a case that Emanuel's former firm was involved. Consequently, Browning-Ferris is once again the controlling Board law on joint employer status. It remains to be seen as to when the Board might revisit Browning-Ferris through another case, but employers should keep a close watch.

'Quickie' Election Rules

The board under the Obama administration engaged in a controversial revision of the union election rules, adopting the "quickie" election rules. Under those rules, employers generally are required to respond in writing to an election petition within seven days of notice and to provide the petitioning union with a list of employees in the unit (including available employee personal telephone numbers and email addresses) only two days following an order directing an election or an election agreement. Further, employers are largely prohibited from litigating at a hearing the status of persons whom the union has chosen to include in the petitioned-for bargaining unit (e.g., the supervisory status of particular employees).

The artificial deadlines and restrictions under the "quickie" election rules have cut the time between the filing of a petition and the election from a median of approximately 38 days prior to the new rules to a median of approximately 23 days. Many employers and their representatives have argued that the truncated amount of time an employer must respond to a union petition disproportionately harms employers, particularly given that unions have unlimited time to plan their organizing strategy and may engage in organizing activity before filing an election petition.

Signaling its intent to revisit the "quickie" election rules, the new board majority published a *Request for Information (82 FR 58783*-01) over the strong dissent of the union-side board members, in which it requested that interested persons provide the board with their views on whether the "quickie" election rules should be retained or revised in whole or in part. The board has twice extended the deadline to provide comments and will now receive submissions from interested parties until April 18, 2018. It remains to be seen if and how the board will alter the current election rules.

Revising Work Rules Test

On Dec. 14, 2017, the board issued its decision revising the standard applied to evaluate the validity of employer work rules. In *The Boeing Company, 365 NLRB No. 154 (2017)*, the board overruled the "reasonably construe" standard for evaluating employer work rules established in *Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)*. That standard provided that a facially neutral work rule is unlawful if employees could "reasonably construe" the rule to prohibit protected activity.

This standard proved difficult to apply and produced confusing and inconsistent results. Further, the board's application of the standard threatened to invalidate myriad logical and commonsense employer rules and led NLRB regions to routinely ***turn*** unfair labor practice charges into cases attacking the validity of employer handbooks, even when the handbooks were largely unrelated to the underlying conduct at issue.

The board addressed these shortcomings in Boeing, announcing a new standard in which it would no longer apply the "reasonably construe" test but would instead balance two interests: the nature and extent of a rule's impact on NLRA rights and an employer's legitimate justifications for the rule.

Although the new Boeing standard on its face provides for a more balanced analysis, it remains to be seen how the board will apply it to employer work rules. Further, there is also a risk that the Boeing case will be vacated for similar reasons as Hy-Brand. Considering the uncertainty moving forward, employers should continue to carefully review their employment practices and policies to confirm compliance with the law.

Dynamic Changes

The board under a Republican majority has expressed its clear intent to reverse the course established by the board under the previous administration, which should be a welcome sign to the business community. The changes are dynamic, however, as the board is currently in a 2-2 deadlock until a new member is confirmed by the Senate. Although the current nominee, John Ring, appears to be heading towards confirmation, it is unlikely that any major changes in the law will be made until a new

member is situated on the board. Even after Ring's anticipated confirmation, it is unclear as to what extent and how quickly businessfriendly changes will occur.

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