Insights: Alerts

The NLRB Adopts New Standards for Analyzing Workplace Rules and Determining Joint-Employer Status

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The recent addition to the National Labor Relations Board (the "Board") of two new members appointed by President Trump has altered the balance of power at that agency. This change was reflected on December 14, 2017, when the Board overruled two controversial decisions that have attracted wide attention in the last few years. In *Boeing Co*., the Board overruled its 2004 decision in *Lutheran Heritage Village*, which had held that merely maintaining a facially neutral policy or rule that could reasonably be construed by employees to prohibit activity protected by Section 7 of the National Labor Relations Act ("NLRA") was an unfair labor practice, and in *Hy-Brand Industrial Contractors, Ltd*., the Board struck down its 2015 ruling in *Browning-Ferris Industries*, which had held that a company could be a joint employer of another employer's employees if the company merely had the right to exert control over terms and conditions of employment for the other employer's employees. These decisions, discussed below, represent the beginning of what is expected to be a major sea change in the approach of the Board to labor-management relations.

The Board's Decision in Boeing Co.

Section 7 of the NLRA protects the right of employees to act together for "mutual aid and protection" with respect to the terms and conditions of employment. This right, which applies to employees in both union and union-free settings, is not limited to union-related activity and extends to most types of concerted activity relating to wages, benefits, working conditions, and other terms and conditions of employment. The Board's 2004 ruling in *Lutheran Heritage Village* held that employers violated the NLRA when they maintained a facially neutral workplace rule or policy that could be reasonably construed by employees to prohibit the exercise of Section 7 rights, even though the rule or policy was not adopted to restrict such rights and had never been applied against employees for engaging in Section 7 activities. In recent years, this ruling has been applied to outlaw such common employer policies as rules prohibiting the use of cameras in the workplace, policies requiring employees to behave in a civil and professional manner, and rules prohibiting the use of abusive or profane language in the workplace. The newly reconstituted Board has now determined that the *Lutheran Heritage Village* standard for examining the lawfulness of facially neutral workplace rules improperly failed to take into account employer justifications for such rules and failed to give meaningful consideration to real-world concerns in the workplace. The Board's new decision in *Boeing Co*. overruled the *Lutheran Heritage Village* standard and, in its place, adopted the rule that when addressing the lawfulness of maintaining a facially neutral policy that was not adopted in response to Section 7 activity or applied against employees engaging in Section 7 activity, the Board will adhere to the following analysis:

- The Board will first determine whether the policy, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights.
- If employees could reasonably conclude that the policy prohibits the exercise of Section 7 rights, the Board will

evaluate the nature and extent of the potential impact on Section 7 rights and the employer's legitimate justifications for the policy.
- The lawfulness of the policy will be determined by balancing the impact on Section 7 rights against the legitimate justifications for the policy.

In *Boeing Co.*, the Board applied this new test to the employer's rule prohibiting the use of cameras in the workplace. The Board found that the rule could reasonably be construed as prohibiting the use of cameras for activities protected by Section 7 such as photographing a concerted protest against working conditions. Moving on to the next step of the analysis, the Board found that the impact on Section 7 rights was comparatively slight, as the vast majority of photographs or videos that might be taken by employees in the workplace would likely not implicate those rights. The Board found that the employer had unusually strong justifications for the no-camera policy, which was intended to protect intellectual property, prevent industrial spying, comply with the employer's obligations as a federal contractor, and serve national security interests, among other things. On balancing the competing interests, the Board concluded that the substantial employer justifications for the policy outweighed the comparatively slight impact on Section 7 rights and held that the employer did not violate the NLRA by maintaining the policy.

The Board's Decision in Hy-Brand Industrial Contractors, Ltd.

Two separate employers can be found to be the joint employers of the same group of employees when the two employers both have sufficient control over the employees. Joint-employer status is significant because each joint employer can be held liable for the other joint employer's unfair labor practices, and both joint employers can be required to bargain collectively with a union representing the jointly employed employees. In 2015, the Board in *Browning-Ferris Industries* adopted a new test for joint-employer status that substantially reduced the level of control an employer must have to be the joint employer of another employer's employees. The Browning-Ferris decision recognized that an employer could be a joint employer not only if it exerted direct and immediate control over another employer's employees, but also if it had “indirect control” or the mere contractual right to exercise control over the other employer's employees. This decision greatly enhanced the likelihood that an employer could be found to be the joint employer of a contractor's employees working on its premises or that a franchisor could be found to be the joint employer of its franchisees' employees.

In *Hy-Brand Industrial Contractors, Ltd.*, the Board overruled the *Browning-Ferris* standard for joint-employer status, finding, among other things, that it exceeded the Board's statutory authority. The Board reverted to the joint-employer standard that had been in place before the Browning-Ferris ruling. That standard finds joint-employer status to exist when one employer actually exerts direct and immediate control over the employees of another employer with respect to “essential” employment terms and not merely with respect to matters that are “limited and routine.” Under this standard, an employer that merely has a contractual right to control another employer's employees in certain respects or that merely exercises control over routine matters such as the time of day during which services will be performed would not qualify as a joint employer of the other employer's employees.

Practical Implications

The Board's decision in *Boeing Co.* gives employers far greater latitude in maintaining workplace rules that serve legitimate employer interests, even though they may have some implications for employees' Section 7 rights. The fact that an employer's legitimate justifications for a workplace rule will now be considered by the Board, along with

the nature and extent of the rule's impact on Section 7 rights, enhances the likelihood that a challenged rule will be held lawful, but the balancing test incorporated in the new standard does not assure that a facially neutral workplace rule will always prevail over employees' Section 7 rights, even though there is a legitimate basis for it. Employers should also remember that the *Boeing Co.* decision changed the standard for analyzing when an employer's maintenance of a facially neutral rule violates the NLRA, but it did not change existing law prohibiting employers from adopting rules in response to Section 7 activity or from applying neutral rules against employees for engaging in protected Section 7 activities.

The Board's decision in *Hy-Brand Industrial Contractors, Ltd.* does not eliminate the concept of joint employment under the NLRA, but does make it more difficult to establish joint-employer status. Employers that use leased employees or subcontractors and franchisors that maintain certain authority relating to the employees of franchisees should examine their practices under the new standard to determine if there is a significant risk of joint-employer status.

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