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NLRB Sends Holiday Cheer to Employers

by James F. Hendricks, Jr.

A FREEBORN & PETERS LLP CLIENT ALERT

ABOUT THIS CLIENT ALERT:

Changes to previous NLRB policies revert to historical precedent in recent actions by the Trump administration's NLRB appointees.

The newly appointed National Labor Relations Board majority has issued a new series of decisions which scrap the pro-union decisions of the prior Board. These decisions effect both union and non-union employers. These decisions impact:

1. Joint Employer Test

In August, 2015, the Board in *Browning Ferris* overturned 30 years of precedent by removing the joint-employer test which had held that two companies would only be considered joint employers if they shared governing the terms and conditions of employment. In that case, they would be joint employers if they both actually exercised the right to control the employment environment.

The new Board has renounced the *Browning Ferris* ruling where the Board found joint employers where one employer had the right to control, even though it was never exercised. The Board's December 14 decision holds that if reserved control has not been actually exercised, it will not be adequate to establish a joint employer relationship.

2. Work Place Rules and Handbooks

During the previous administration, the NLRB constantly attacked company work rules, typically rules included in employer handbooks. Their interpretation of the 2004 *Lutheran Heritage* decision involving workplace civility rules, holding that an apparently neutral work rule that did not explicitly restrict employees' Section 7 rights would still be unlawful if employees could "reasonably construe" the rule to prevent them from exercising their rights.

In 2015, then NLRB General Counsel, Richard Griffin, issued a memorandum summarizing work rules he determined would violate the employee Section 7 rights. New NLRB General Counsel, Peter Robb, has rescinded the Griffin memorandum.

> On December 14, 2017, the Board overruled the ALJ's finding in *Lutheran Heritage*.

The Board's position is now:

> When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the NLRB will evaluate: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.
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> In the new balancing of interests by the NLRB, they created three categories of policies and rules:
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> **Category 1:** Rules that the Board designates as lawful to maintain, either because (i) when reasonably interpreted, the rule does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. This category includes camera rules like Boeing's, as well as workplace civility rules.
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> **Category 2:** Rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
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> **Category 3:** Rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. This category would include a rule that prohibits employees from discussing their wages.
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> Now it appears that the Board will review both the business justification for such rules and the potential impact on employees' Section 7 rights under the NLRA.

3. Elimination of Micro-Units

In 2011, the NLRB overturned 20 years of Board precedent with its controversial *Specialty Healthcare* decision. In its gift to organized labor, the Board allowed unions to organize a minority portion of an employer's workforce, commonly referred to as "micro-units," rather than a majority of the employers who shared a "community-of-interest" which had been the precedent.

Rather than sharing a community of interest, the Board allowed unions to organize any group that it represented as "readily identifiable" based on job classification, departments, work location or similar factors.

The employer then had the burden to show that other employers "shared an overwhelming community-of-interest" with the employer for whom the union petitioned.

On December 15, the new Board (one day before Chairman Miscimarra's term ended) found *Specialty Healthcare* inappropriately created a regime where "the extent of union organizing is 'controlling' or at the very least gives far greater weight to that factor than statutory policy warrants because the petitioned-for unit is deemed appropriate in all but rare circumstances."

The Board has now reaffirmed that the community-of-interest test requires "the Board in each case to determine whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised."

WHAT DOES ALL THIS MEAN TO EMPLOYERS?

Employers can now enter 2018 thinking the past eight years have been a bad dream and labor relations will have been restored to its original starting line. Employers will no longer have to deal with certain unit choices and dormant handbook provisions will no longer serve as a de facto search warrant for overzealous NLRB investigators.

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ABOUT THE AUTHOR

James F. Hendricks, Jr.

Partner

Chicago Office
(312) 360-6307

jhendricks@freeborn.com

Jim is a Partner in the Litigation Practice Group and focuses his practice on Employment Counseling and Litigation. He represents a variety of employers in union campaigns, National Labor Relations Board charges, collective bargaining, discrimination and human resource issues. His clients work in a variety of industries, including automotive, construction, hospitality, manufacturing and health care.

Jim counsels operations and human resource executives on a variety of issues regarding the development and implementation of employment policies and procedures. He counsels employers facing labor and employment issues that arise in mergers, acquisitions and divestitures, personnel transactions, and also advises on preventive labor and employment strategies and training.

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CHICAGO
311 South Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 360-6000
(312) 360-6520 fax

NEW YORK
230 Park Avenue
Suite 630
New York, NY 10169
(212) 218-8760
(212) 218-8761 fax

SPRINGFIELD
217 East Monroe Street
Suite 202
Springfield, IL 62701
(217) 535-1060
(217) 535-1069 fax

RICHMOND
411 East Franklin Street
Suite 200
Richmond, VA 23219
(804) 644-1300
(804) 644-1354 fax

TAMPA
1 Tampa City Center
201 North Franklin Street
Suite 3550
Tampa, FL 33602
(813) 488-2920