LEGAL UPDATES

PUBLISHED: DECEMBER 15, 2017

NLRB Overturns Precedents on Employee Handbooks and Joint Employers

Service

Labor & Employment

Professionals

LAURA L. MALUGADE
MILWAUKEE:
414.978.5497
LAURA.MALUGADE@
HUSCHBLACKWELL.COM

TERRY L. POTTER
ST. LOUIS:
314.345.6438
TERRY.POTTER@
HUSCHBLACKWELL.COM

KEY POINTS

The NLRB rolled back two Obama-era rulings that many believed unfairly favored unions.

The legality of employee handbook policies will now be judged by weighing workers' rights against an employer's business justifications.

Companies will now be deemed joint employers only when they exercise direct control over workers.

Employers Welcome 'Trump Board' Rulings

On December 14, 2017, the National Labor Relations Board (NLRB or the Board) overruled two highly controversial Obama-era decisions governing employee handbooks and joint employment standards. Earlier this year, President Trump appointed two Republicans to the five-member NLRB, resulting in a 3-2 Republican majority for the first time in a decade. As we previously discussed here and here, the new "Trump Board" is beginning to dismantle a series of decisions that many believed to unfairly favor unions.

New Standard Governs Employee Handbooks

In a split 3-2 decision, the Board in *Boeing Co.* overturned its 2004 *Lutheran Heritage* standard, which had been used in recent years to render countless employer policies and rules unlawful. The former standard provided that a

policy or rule was unlawful if employees could "reasonably construe" the language to bar them from exercising their rights under the National Labor Relations Act (NLRA), such as discussing terms and conditions of employment. The *Lutheran Heritage* standard had been heavily criticized for failing to take into account legitimate business justifications for employer policies, rules and handbook provisions, in addition to yielding unpredictable and sometimes contradictory results. For example, the standard had deemed as unlawful policies that require employees to "work harmoniously" or conduct themselves in a "positive and professional manner."

Boeing Co. establishes a new test that balances workers' rights against an employer's business justifications. 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 now 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 also announced three categories of rules that would be used to provide greater clarity and certainty to employees, employers and unions going forward.

Applying its new standard, the Board majority reversed the administrative law judge's decision and upheld as lawful Boeing's "no camera" rule, which prohibited employees from using camera-enabled devices to capture images or video without a valid business need and an approved camera permit. The Board reasoned that any adverse impact on workers' rights was comparatively slight and outweighed by substantial and important justifications associated with the no-camera rule.

NLRB Ditches 2015 Joint Employer Standard

In another 3-2 decision along party lines, the NLRB in *Hy-Brand Industrial Contractors* overruled its 2015 decision in *Browning-Ferris,* which expanded joint employer liability and threatened to turn every company that works with contingent workers, franchisees and independent contractors into a joint employer under the NLRA. Under the former standard, the Board held that the right to exercise minimal or "indirect" control over essential terms and conditions of employment, even if not actually exercised, was sufficient to create a joint employer relationship.

Under the Board's new standard, two or more entities will be deemed joint employers under the NLRA if there is proof that one entity has actually exercised meaningful control over essential employment terms of another entity's employees (rather than merely reserving the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine. Thus, proof of indirect control, contractually reserved control that has never been exercised, or control that is limited and routine will no longer be sufficient to establish a joint employer relationship.

Applying this restored pre-2015 standard, the Board upheld the administrative law judge's determination that Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co. were joint employers and therefore jointly liable for the unlawful discharge of seven striking employees.

What This Means to You

The Board's decision in *Boeing Co*. has been long awaited by union and non-union employers struggling to comply with the NLRB's increasingly stringent requirements governing employer policies, rules and handbook provisions. The recent decision signals that the NLRB's strict scrutiny of employer policies and rules may be winding down, and provides employers an opportunity to maintain facially neutral policies with a legitimate business justification even if there may be some impact on workers' rights under the NLRA. As always, it is recommended that employers review employee handbooks annually to keep up with changing laws.

The Board's new standard governing joint employers is also welcome news in that it raises the bar for establishing a joint employment relationship with staffing agencies, franchisees and independent contractors where one entity exercises minimal or indirect control over the other. The joint employer determination is significant because it means that either entity may be subjected to joint liability for collective bargaining obligations, unfair labor practices and breaches of collective bargaining agreements.

Contact Us

For more information about how the new NLRB standards might impact your organization, please contact Laura L. Malugade, Terry L. Potter or another member of Husch Blackwell's Labor & Employment team.