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NLRB Relaxes Standard for Review of Employer Work Rules and Joint Employer Status

December 15, 2017

The National Labor Relations Board (NLRB or Board) has overruled two precedents that had been particularly nettlesome to the employer community. First, in *The Boeing Company* the NLRB, in a 3-2 decision on Dec. 14, 2017, overturned prior law that had held that a facially neutral employer work rule might still violate the National Labor Relations Act (Act) if it could be reasonably construed by employees to prohibit conduct protected by Section 7 of the Act. Second, in *Hybrand Industrial Contractors,* again by a 3-2 split on Dec. 14., the NLRB overruled the *Browning Ferris* decision, which had expanded the concept of joint employment.

In *Boeing,* the Board expressly overruled its prior decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), even though none of the parties to the case had argued for its extinction. In *Lutheran Heritage Village,* the Board held that an employer work rule, neutral on its face, violated the Act if it "could reasonably be interpreted" as restricting protected concerted activity by employees.

In recent years, application of this case led to findings that seemingly innocuous rules requiring civility and respect in the workplace, limiting workplace access and regulating attendance violated the Act.

The majority announced a new two-part balancing test that it will use in work-rule cases going forward. First, the Board will analyze whether the rule as "reasonably interpreted" is likely to negatively affect employee Section 7 rights. If it does not, there will be no violation. If it does, the Board will examine whether the actual or potential impact on Section 7 rights is justified by the substantiality of the employer interests protected by the rule. The Board was careful to point out that even rules that were found permissible under this test could lead to a finding of a violation if the rule were discriminatorily applied. In applying the balancing test to Boeing's "no camera" rule, the Board found Boeing's security interests far outweighed any arguable impact on Section 7 rights. Finally, the Board suggested that so-called workplace civility rules might be permissible, even though no such rule was involved in the case.

In *Hybrand,* the majority again overturned a prior decision in *Browning-Ferris.* That decision had greatly expanded the range of companies who could be found to be joint employers by holding that retention of theoretical contract rights by one entity to control the labor relations of another would be sufficient even if little if any practical control was exercised. The Board majority overruled this aspect of *Browning-Ferris* and held that the pre-*Browning-Ferris* requirement that the control be actually exercised and that it be "direct and immediate" would be applied to cases going forward.

What Does This Mean for Employers?

The most immediate practical implication will be on employer handbooks, policies and work rules. Employers who reacted to *Lutheran Village* by softening work rules relating to access, attendance, civility, or other areas might want to consider revisiting those rules under the new standard. Other employers should audit their work rules and policies to determine whether changes are necessary. In either case, a guiding principle would be to articulate the substantial employer interest that justifies the rule.