Healthcare Employers Rejoice? Recent Shift In NLRB Decisions Impacts The Industry

Insights
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A new Republican majority took hold over the National Labor Relations Board (NLRB) at the end of 2017, leading to several significant labor decisions. Because the NLRB's decisions and actions impact all industries, healthcare employers should take note. While the new Trump-era Board certainly marks a welcome shift for businesses, including healthcare entities, it remains crucial that employers continue to evaluate internal policies and practices to ensure legal compliance with the changing landscape.

The Board's New Standard For Determining Joint Employer Status
On December 14, 2017, in *Hy-Brand Industrial Contractors Ltd.*, the NLRB overturned its standard for determining joint employer status under the National Labor Relations Act (NLRA) that had been established during the Obama era in *Browning-Ferris Industries of California, Inc*. The *Hy-Brand* standard, marking a return to the previous "direct and immediate control" rule, will be applied to any matter currently pending before the Board, as well as to all new matters going forward.

The *Hy-Brand* standard is a return to the common law test for determining whether an employer-employee relationship exists as a predicate to finding joint employer liability. Under *Hy-Brand,* joint employer status will only be found where two or more entities actually "share or codetermine those matters governing the essential terms and conditions of employment," such as hiring, firing, discipline, supervision, and direction, and where the entities' "control" is direct and immediate, and not limited or routine in nature.

In explaining the rejection of the expansive *Browning-Ferris* standard, the Republican majority criticized the Obama-era test as a distortion of common law and contrary to the NLRB's primary responsibility to foster stability in labor management relations. The *Hy-Brand* case is indicative of the NLRB's shift to a more balanced playing field in accordance with the Trump administration. However, as expected, Democratic NLRB members issued a scathing dissent, chastising the majority for a "willful misunderstanding of the joint-employer standard adopted in *Browning-Ferris"* and for failure to solicit public comment before overturning NLRB precedent.

Despite the NLRB's return to its prior joint employer standard, you should refrain from jumping for joy just yet. The Equal Employment Opportunity Commission (EEOC), the Department of Labor, and some courts and agencies have adopted versions of the *Browning-Ferris* standard, and those

entities aren't going away anytime soon. While the *Hy-Brand* decision may encourage a push to narrow the employer-employee relationship, you can still be found jointly liable outside the Act.

Moreover, you should bear in mind that while the NLRB relaxed the test for finding a joint employer relationship, it did not altogether eliminate the possibility that two or more employers can be found jointly liable. Healthcare industry employers such as hospitals, outpatient facilities, and other healthcare providers usually face the issue of joint employer liability in the context of contracts with third-party staffing agencies. Thus, you should continue to explicitly distinguish your arrangement from an employer relationship by ensuring that any contracted staffing agency is the sole entity controlling the terms of employment for their workers, including the right to hire and fire, the ability to set assignments and work schedules, training, and the determination and provision of compensation and benefits.

[ED. NOTE: On February 26, 2018, the NLRB vacated its decision in *Hy-Brand* due to a possible conflict of issue raised against one of the deciding Board members, and reverted to the troubling *Browning-Ferris* standard. For a more detailed discussion about the impact of this decision, please read here.]

New Standards Governing Workplace Policies

In *The Boeing Company* decision, also decided on December 14, 2017, the NLRB adopted new standards for determining whether facially neutral workplace rules, policies, and employee handbook standards unlawfully interfere with the exercise of NLRA-protected employee rights. Under the new test, the Board will evaluate the nature and extent of the potential impact of the facially neutral policy on the exercise of NLRA rights, and the legitimate justifications associated with the rule. The prior test found a violation of the NLRA if the workplace policy could be "reasonably construed" by an employee to prohibit the exercise of NLRA rights, regardless of policy that did not explicitly prohibit protected activity, was not adopted in response to such activity, or had not been applied to restrict such activity.

In sum, the *Boeing* decision permits the NLRB to examine an employer's workplace policies on a case-by-case basis, providing for an inquiry-specific analysis of the workplace rule to determine the effect (if any) on an employee's exercise of NLRA rights and whether that effect is outweighed by the employer's legitimate justifications for the policy. It marks a stark departure from prior decisions finding employer violations of the NLRA for simply maintaining rules requiring employees to foster or abide by basic standards of civility in the workplace.

While the decision is certainly a "win" in the employer column, it remains critical to carefully assess facially neutral workplace policies to ensure consistent and lawful application in practice. Healthcare facilities and hospitals, often comprised of various and distinct departments with idiosyncratic rules and regulations, are no exception. Therefore, you should take particular heed to the neutral application of workplace policies across the board.

Potential Shift On Grad Students As "Employees"?

In an unpublished order that flew under the radar for many healthcare employers, Republican NLRB members also announced in the final days of 2017 that they would reconsider the Obama-era ruling allowing graduate student workers at private schools to unionize. In a controversial 2016 ruling, the NLRB found that student assistants were considered statutory "employees" because "they perform work, at the direction of the university, for which they are compensated," thereby allowing such students to unionize. However, the new Republican Board has now signaled a likely return to an inquiry focused on the student assistants' relationship to the school as being "primarily educational," thereby distinguishing graduate students from "employees."

This is potentially good news for the healthcare industry, where private hospitals often grapple with the employment classification of graduate student workers and the rights and benefits flowing from the appropriate classification. While at this point you must be careful to maintain the status quo—that is, comply with the current law allowing graduate students to unionize—you can rest soundly knowing that 2018 has the potential to see an additional influx of positive decisions from the NLRB.

Conclusion

As always, it remains critical to stay abreast of your obligations under the law, including new and controversial decisions from the NLRB. As politics often shape the partisan interpretation of rules and regulations by administrative agencies, it is important that we, as employers, are ready to adapt to an ever-changing landscape, whether it be good, bad, or ugly.

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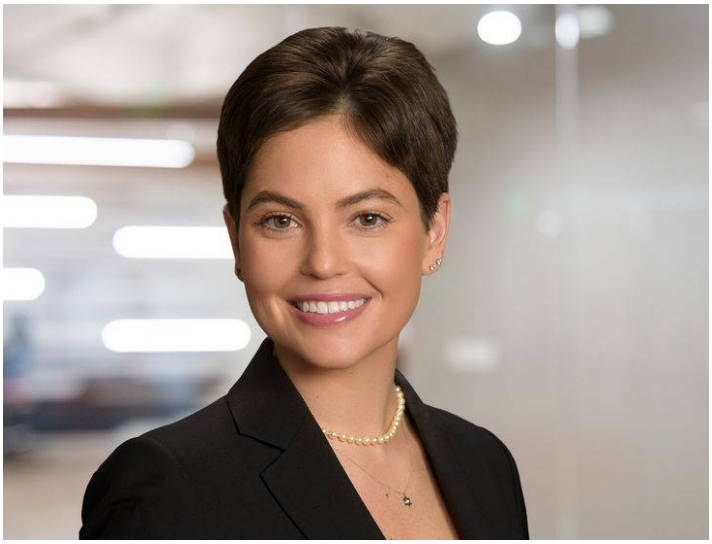

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