End of the Year Whirlwind for Labor and OSHA Matters! Part II of III – NLRB.

Insights
12.31.17

No other agency so radically changed the law under the Obama Administration; nor galvanized so much management-side resistance as the National Labor relations Board (NLRB). So it seems appropriate that the NLRB would stagger us with numerous end-of-the-year changes in a TWO-WEEK PERIOD. Gotta keep it dramatic ….

NLRB Returns to Pre-Obama Era Test for Determining Joint Employment.
Few Obama Administration policies more angered employers that the unworkable and confusing test the NLRB adopted in *Browning Ferris Industries* (2015) to determine that two businesses were joint employers of the same employees. This joint employer obligation was broader and more invasive than joint employer liability under other employment-related laws. The expansive test was intended by its union proponents to scoop up the increasingly common franchisee employees and other modern employment relationships. Realistically, the Browning Ferris standard created the potential for generous limitless numbers of Unfair Labor Practice (ULP) Charges – and the deck is always stacked against employers in ULP proceedings.

In *Browning Ferris*, the NLRB concluded that two businesses can be joint employers when one business simply possessed "indirect" or "reserved" control – even if they have never exercised it.

The previous NLRB test finding joint employment only where two businesses shared "direct and immediate control." Proponents of the *Browning Ferris* test felt that franchisors and others set and controlled terms and conditions of employment without liability. And of course, franchisees and other new forms of employment are earnestly desired by unions as an expanding group to try to organize.

- The *Hy-Brand Industrial Contractors Ltd. and Brandt Construction* decision restored the old test.

On December 14, in *Hy-Brand Industrial Contractors Ltd. and Brandt Construction*, the NLRB restored the Common Law test that businesses would only be joint employers if they shared or codetermined those matters governing the essential terms and conditions of employment – and an employer would only be a joint employer if it actually exercised its right to control – and the control was direct, immediate, and not limited and routine.

After the NLRB's reversal in Hy-Brand, the NLRB asked the D.C. Circuit Court to reverse the *Browning Ferris* decision. The Court did so on December 28 and in a one-sentence decision sent the case back to the NLRB.

Both sides claim that they are following the "Common Law" Test (commonsense?), so the real argument is in how the NLRB applies common law theories.

Therefore, while the new decision, *Hy-Brand*, overturned the *Browning Ferris* test, the decision did not alter the result in *Hy-Brand*. Joint employment was properly found under either test.

NLRB Overturned the *Specialty Healthcare* Decision which Allowed Unions to Gerrymander Bargaining Units for Elections.

The December 18, 2017 *PCC Structurals* decision has been well-publicized because of its importance, but I'm proud of the FP attorneys who achieved this result: Philadelphia attorneys Rick Grimaldi and Lori Armstrong Halber, and Portland partner Todd Lyon.

The 2011 Specialty Healthcare decision overturned 20 years of Board precedent and allowed unions to pick the employees it could organize with little consideration of whether the proposed bargaining unit made sense.

Under the *Specialty Healthcare* standard allowed unions to define smaller bargaining units **("Micro Units")** based on the extent of the union's organizing. If a union petitioned for an election among a particular group of employees, it merely needed to show the group it organized represented a "readily identifiable" group based on job classifications, departments, functions, work locations, skills, or similar factors. The burden then shifted to the employer to demonstrate that additional employees "*shared an overwhelming community of interest*" with the petitioned-for employees - an almost impossible standard for employers to meet. Great way to establish a foothold when the majority of employees seem uninterested in the union ….

In *PCC Structurals*, the NLRB returned to the traditional community-of-interest standard that 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."

More Deference for Employer Rules

On December 14, in *Boeing Co.*, the Board overturned *Lutheran Heritage* and directed future panels to balance the "nature and extent" of challenged rule's "potential impact on NLRA rights" and the

"legitimate justifications associated with the rule."

In *Lutheran Heritage*, the NLRB said businesses can't maintain workplace policies that workers could "reasonably construe" to interfere with their rights to join together under the NLRA.

Fair enough statement ... except that the Obama era NLRB used the standard to challenge reasonable policies ranging from social media use restrictions to limits on recording in the workplace - even bringing charges in some cases where no union existed.

Hundreds of NLRB Unfair Labor Practice decisions hindered employers from mandating civil and professional behavior in the workplace and hindered combatting harassment – all in the misguided belief that employees could only express their labor positions with curses and abusive behavior and outrageous attacks on companies, their supervisors, coworkers and customers. Even worse, few patterns and bright line tests were discernable in the NLRB decisions.

The new test states that whenever a facially neutral rule, "when reasonably interpreted, would potentially interfere with Section 7 rights," two things must be considered:

"(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate [business] justifications associated with the requirement(s)."

The NLRB will now consider the needs of a business when the lawfulness of a given rule is considered.

We hope that this change signals the future roll back of rulings that held various rules and employee handbook policies were unlawful; however, because the Board's pro-business majority proved short-lived and we now have a 2-2 split in members, we do not expect another flurry of activity for a while. It will take time for the Trump Administration select a nominee and for for the nominee to make his/her way through the process in a highly partisan Senate. However, the General Counsel does not have the same restrictions and can continue shaping the direction of the prosecutorial arm of the NLRB. NLRB GCs have far more power to shape enforcement than do similar counsel in other agencies.

More Settlement Power for Board Judges

In a case involving the *University of Pittsburgh Medical Center*, the NLRB said its judges can sign off on settlements that resolve only a portion of claims in a given labor suit even if the agency's general counsel and the party bringing charges object.

The ruling reversed the Obama Board's 2016 *U.S. Postal Service* holding that judges can only accept settlements where all parties agree.

Revised Unilateral 'Change' Doctrine

Though the NLRA blocks unionized employers from making unilateral changes to employment terms, the NLRB has generally held that revisions consistent with past practices aren't "changes."

The Obama era NLRB ruled in 2016 in *DuPont*, that employers must bargain over even these changes in certain cases.

But the *DuPont* ruling was overturned in a case involving *Raytheon Network Centric Systems.* The *Raytheon* majority said *DuPont* "distorts the long-understood, common sense understanding" of what a change is, adding that restricting employers could destabilize bargaining relationships.

How's that for a wild two-week ride?!

Happy New Year.

Howard