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Labor and Employment Alert
December 2017

National Labor Relations Board Overturns Key Prior Rulings on Employee Handbooks and Joint Employer Liability

The National Labor Relations Board ("NLRB" or "Board") has been active recently, reaching decisions on two important issues: employee handbooks and joint-employer liability. These decisions directly affect most private employers, and the impact of these decisions will be felt across multiple areas of law, and in both the public and private sectors.

Employee Handbooks/Workplace Rules

In a 3-2 decision, on December 14, 2017, the Board overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which articulated the Board's previous standard governing workplace rules, policies, and employee handbook provisions under the National Labor Relations Act ("NLRA").

Under the prior standard, the Board found that employers violated the NLRA by maintaining workplace rules that would be "reasonably construed" by an employee to prohibit the exercise of NLRA rights, even where the rules do not prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities.

In place of this "reasonably construe" standard, the Board established a new test. When evaluating a facially neutral rule that would potentially interfere with the exercise of NLRA rights, the Board will now evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The new test will have a significant impact on how handbook policies are reviewed and analyzed, with employers having more leeway to adopt policies regulating workplace conduct.

Of particular note, under the new standard, the Board will generally find reasonable rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace to be lawful. Other rules, the Board notes, will require "individualized scrutiny" to determine whether it meets the new standards. Rules that would prohibit or limit NLRA-protected conduct and where the adverse impact on NLRA rights is not outweighed by justifications associated with the rule will generally be considered unlawful – for example, a rule prohibiting employees from discussing wages or benefits with each other would be unlawful.

However, it is important to note that even if it is lawful to maintain a rule under this new standard, it is still the case that the specific application of such rules to employees who have engaged in NLRA-protected activity may violate the NLRA.

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Joint-Employer Liability Under the National Labor Relations Act

In another 3-2 decision on December 14, 2017, the Board overruled it's 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) ("*Browning Ferris*") and returned to the pre–*Browning Ferris* standard that governed joint-employer liability.

According to the Board, in all future and pending cases, two or more entities will be deemed joint employers under the NLRA if there is proof that one entity has *exercised* control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so *directly and immediately* (rather than indirectly) in a manner that is not limited and routine.

Under the pre–*Browning Ferris* standard, which was restored by the Board's recent decision, proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship under the NLRA.

Next Steps for Employers

The Board's decision related to handbooks and workplace rules provides an opportunity for employers to review their handbooks and policies and consider revisions in light of the new standard. Careful attention to the limits of the Board's decision is still necessary to avoid violation of the NLRA.

The Board's decision related to joint-employer liability will likely affect many industries, especially contractors and those who use outsourced or contract labor, and could also prove persuasive in other areas of law where joint-employment liability is raised.

We expect the Board to continue to be active reviewing previous cases and applying its new standards. Stay tuned for additional updates.

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