# NATIONAL LABOR RELATIONS BOARD RESTORES MANAGEMENT FRIENDLY STANDARDS FOR UNIONIZED AND NONUNIONIZED EMPLOYERS

*Labor and Employment Alert*
December 19, 2017

In a flurry of management-friendly decisions issued over the last week, the National Labor Relations Board ("Board") reversed several Obama-era Board rulings that had substantially modified – often in favor of workers and unions - the standards under the National Labor Relations Act (the "Act"). As discussed in this alert, the Board's decisions relate to rules for determining (1) whether a joint-employment relationship exists between two separate employers, (2) whether a facially neutral employment policy violates the Act, (3) what constitutes a "change" in terms and conditions of employment that is subject to bargaining, and (4) the appropriate bargaining unit of employees. In addition, the Board has requested input on the "quickie election" rules of 2014.

**The Board Reinstates the Standard for Determining Joint Employment**

By way of background, in August 2015, the Board adopted a new standard for determining whether two separate employers may be considered a joint employer under the Act. *See Browning-Ferris Industries of California, Inc.* 362 NLRB No. 186 (2015). As we had previously reported in *Browning-Ferris*, the Board concluded that Browning-Ferris was a joint employer with a staffing company of workers provided by the staffing company to work at Browning-Ferris's facility. In so ruling, the Board relied on the fact that Browning-Ferris exercised indirect (versus direct) control over the staffing company's employees, and Browning-Ferris had reserved, by contract with the staffing company, the right to affect the essential terms and conditions of employment of the staffing company's employees. The Board's *Browning-Ferris* standard made it more likely that a number of other relationships between two separate and independent employers would be found to constitute a joint employment relationship.

But on December 14, 2017, in *Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), the Board discarded the *Browning-Ferris* standard and determined that it would use the "direct and immediate control" standard to determine whether two employers are joint employers for purposes of the Act. The Board explained that under this standard, a "finding of joint-employer


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status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"

**The Board Changes the Standard for Determining Lawfulness of Workplace Policies**

During Obama's term as President, the Board had issued a number of decisions that struck employment policies as facially invalid under the Act because, in the Board's opinion, the policies could be interpreted as stifling or prohibiting employee activities or rights protected by the Act. On December 14, 2017, however, in *The Boeing Company,* 365 NLRB No. 154 (2017), the Board adopted a new standard for determining whether "facially neutral workplace rules, policies and employee handbook standards unlawfully interfere with the exercise" of employees' rights under the Act. The Board ruled that, "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 will evaluate (i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rule." To provide clarity in applying *The Boeing Company* standard, the Board identified three categories of employee workplace rules: (1) lawful rules (e.g., no-camera rule, rules regarding basic standards of civility), (2) rules that require individualized scrutiny, and (3) unlawful rules (e.g., rules prohibiting employees from discussing wages or benefits with each other).

**The Board Clarifies Employers' Obligation to Bargain Concerning a "Change" in Employment Terms**

In 2016, the Board held that actions consistent with an established past practice constitute a change in employment terms and conditions and, thus, require the employer to provide the union with notice and an opportunity to bargain prior to implementing that change, if the past practice was created under a management-rights clause in a CBA that expired or if the disputed actions involve employer discretion. In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), however, the Board ruled that actions do not constitute a "change" if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. The Board also held that this principle would apply regardless of whether (i) a CBA was in effect when the past practice was created, and (ii) no CBA existed when the disputed actions were taken. Applying these principles, in *Raytheon Network Centric Systems,* the Board concluded that an employer's change to employee healthcare benefits in 2013 was a continuation of Raytheon's past practice involving similar unilateral changes made at the same time every year from 2001 to 2012 and, thus, the employer did not violate the Act by failing to give its union advance notice and the opportunity for bargaining before making the 2013 changes.

**The Board Overturns the "Micro-Unit" Ruling**

On December 15, 2017, the Board overturned an Obama-era ruling from 2011 that had made organizing of small units of employees, or "micro-units," easier. *See PCC Structurals Inc.*, 365 NLRB No. 160 (2017). As employers will recall, in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 940 (2011), the Board had held that, so long as a union's petitioned-for unit consists of a clearly identifiable group of employees, the Board will presume the unit is appropriate. Thus, an employer that argued that a unit of proposed employees was inappropriate – and should not be recognized because it should include additional employees, the employer was required to prove employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit. Under the *Specialty Healthcare* standard, it became easier for unions to organize units of employees.

However, on December 15, the Board overruled *Specialty Healthcare*, finding that it gave unions too much power to decide the makeup of bargaining units because the "petitioned-for unit would be deemed appropriate in all but rare cases." Instead, for all pending and future cases, whenever there is a question about the appropriateness of a proposed unit, the Board will examine whether the employees in the petitioned-for unit share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit. The Board will use a multi-factor test that will examine "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."

**A New Look at the Quickie Election Rules**

The Board is also be considering rescinding the "quickie election" rules. In 2014, the Board adopted new union election rules that were intended to expedite the process by which a unit of employees could organize a union. On December 14, 2017, the Board issued a Request for Information, seeking comment on the following three questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?

Since the 2014 election rules were adopted through administrative rule making under the Administrative Procedures Act, the Board will have to go through the same rulemaking process to amend or discard these rules.

*If you have any questions about these developments, please contact any one of our Labor and Employment attorneys.*