Employment Flash
Special Edition

Skadden

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In This Issue:

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Recent NLRB Developments

This December 2017 special edition of the *Employment Flash* summarizes recent decisions issued by the National Labor Relations Board (NLRB) on December 14 and 15, 2017. These decisions are applicable to all employers, including employers with non-unionized workforces.

NLRB Overturns *Browning-Ferris* Joint Employer Test

In a December 14, 2017, decision, *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), the NLRB overturned the landmark joint employer test (BFI Test) described in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015). Under the BFI Test, a company and its contractors or franchisees can be deemed to be a single joint employer under the National Labor Relations Act (NLRA) even if an entity has not exercised overt control over workers' terms and conditions of employment — instead, all that is necessary to show joint employer status is "indirect control" or the ability to exert such control over workers' terms and conditions of employment. Before the BFI Test, a finding of joint-employer status required "direct and immediate" control over the essential terms and conditions of employment. In *Hy-Brand*, the NLRB reverted to the "direct and immediate" control standard. The NLRB reasoned that the BFI Test was contrary to common law as interpreted by the NLRB and the courts, and its application undermined stability in labor-management relations. Applying the "direct and immediate" standard of the joint employer test, the NLRB upheld a ruling by an administrative law judge that two construction companies owned by the same individuals were joint employers and thus both liable for the illegal employment terminations of seven employees who had engaged in protected activity under the NLRA.

NLRB Adopts New Standard Regarding Employment Policies

In another December 14, 2017, decision, *The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001*, 365 NLRB 154 (2017), the NLRB overruled the standard (Lutheran Heritage Standard) in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) for reviewing employment policies and adopted a new standard meant to ensure a meaningful balance of employee rights and employer interests. Under the Lutheran Heritage Standard, a challenged employer rule would be deemed unlawful upon a showing of one of the following: (1) employees would

reasonably construe the language to prohibit activity protected by Section 7 (Section 7 Rights) of the NLRA, which guarantees the right to engage in concerted activities for collective bargaining purposes and other mutual aid and protection; (2) the rule was promulgated in response to union activity; or (3) the rule had been applied to restrict the exercise of Section 7 Rights. In its December 14 decision, the NLRB stated that the Lutheran Heritage Standard prevented the NLRB from giving meaningful consideration to the real-world complexities associated with employment policies. The NLRB expressed skepticism that Congress intended that employers would violate federal law whenever they advised employees to "work harmoniously" or conduct themselves in a "polite and professional manner" — directives that the NLRB stated would not be unlawful under the new standard. The NLRB's new standard applies retroactively and evaluates: (1) the nature and extent of the potential impact on NLRA rights and (2) the legitimate justifications associated with the employer's rule. Applying the NLRB's new standard, the NLRB ruled that an employer's no-camera rule that an administrative law judge found to be unlawful under the Lutheran Heritage Test was lawful under the new standard. The NLRB explained that any adverse impact of the employer's no-camera rule on the exercise of Section 7 Rights was comparatively slight and outweighed by substantial and important justifications associated with the rule.

NLRB Restores Precedent Regarding Employers' Bargaining Obligation

On December 15, 2017, the NLRB reversed a 2016 Obama-era ruling and returned to a standard that allows employers to make unilateral changes to employment policies without a union's permission. The decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) is consistent with the NLRB's 1964 precedent that an employer's unilateral actions do not constitute a "change" if they are comparable to an established past practice. This standard applies regardless of whether a collective bargaining agreement was in effect when the past practice was established or when the employer engaged in the disputed actions. The *Raytheon* decision overturned the NLRB's holding in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) that employers must provide the union with notice and an opportunity to bargain prior to implementing any changes, even if the actions were consistent with an established past practice. In *Raytheon*, the NLRB concluded that the decision in *DuPont* was flawed as "it distorts the long-understood, commonsense understanding of what constitutes a 'change,' and it contradicts well-established Board and court precedent."

NLRB Overturns *Specialty Healthcare*'s 'Micro-Unit' Standard

In another December 15, 2017, decision, *PCC Structurals, Inc. and International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge W24*, 365 NLRB No. 160 (2017), the NLRB overturned its 2011 "micro-unit" standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). The micro-unit standard required an employer seeking to include certain workers in a proposed bargaining unit to prove that such excluded workers share "an overwhelming community of interest" with those included in the proposed unit. In *PCC Structurals*, the NLRB returned to its former approach of examining whether the petitioned-for employees share a community of interest that is "sufficiently distinct" from excluded employees to warrant their own bargaining unit. Noting the rare case of an employer proving an overwhelming community of interest, the NLRB found that exclusion of certain employees from some petitioned-for bargaining units may be inappropriate even when circumstances fall short of the very high *Specialty Healthcare* standard. In *PCC Structurals*, the NLRB granted a review of a decision that had approved a 102-person bargaining unit that the employer argued was too small to merit collective bargaining status. The NLRB remanded the decision for further action under its new standard.

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