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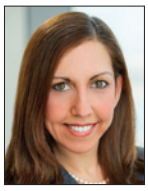
LABOR RELATIONS

Expert Analysis

Reversals of NLRB Precedent Have Significant Implications for Employers



By **David E. Schwartz**

And **Risa M. Salins**

In the days leading to the expiration of National Labor Relations Board Chairman Philip Miscimarra's term this past December, and with the timing of a Republican majority on the Board uncertain, the Board overturned some of its most controversial Obama-era policies and decisions. This month's column discusses those recent significant reversals, including the Board's rulings on joint employer relationships, the standard for determining whether workplace policies applicable to represented and unrepresented employees violate the National Labor Relations Act (NLRA), an employer's obligation to bargain prior to implementing changes consistent with past practice, and the ability of unions to organize so-called micro-units.

Joint Employers

In *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), the Board ruled 3-2 to reverse the controversial joint employer test articulated by the Board just two years earlier in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) (BFI Test). Under the BFI Test, a finding of joint employer status under the NLRA required only that an entity have indirect control, or the right to assert control (even if never exercised), over essential terms and conditions of employment of another entity's employees.

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In overturning the BFI Test, the *Hy-Brand* Board declared the test is a distortion of the common law, contrary to the NLRA and ill-advised as a matter of policy. The Board stated it was restoring the joint employer test in effect for nearly 30 years before the *Browning-Ferris* decision, which requires two entities to exercise joint control or share "direct and immediate" control over essential terms and conditions of employment. The Board further reasoned that a return to this approach to joint employment will enable franchisors and franchisees, among others, to once again do business without the heightened risk of being classified as joint employers. Nevertheless, even under the more employer-friendly pre-*Browning-Ferris* standard, the Board affirmed an administrative law judge's determination that two construction companies were joint employers, because they exercised joint control over essential terms and conditions of employment.

Notably, however, by order dated Feb. 26, 2018, the Board vacated its *Hy-Brand* decision, due to concerns that Board Member William Emanuel, who participated in the decision, had a conflict of interest requiring his disqualification from the proceedings. By vacating *Hy-Brand*, the Board reinstated the less restrictive BFI Test.

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A closely watched case that many anticipated would clarify the joint employer standard now seems likely to end in settlement. *McDonald's USA LLC*, case numbers 02-CA-093893 et al., before the Board, stemmed from a 2014 directive by the Board's then-General Counsel Richard Griffin authorizing dozens of unfair labor practice complaints against McDonald's USA based on a legal theory that the franchisor could be treated as a joint employer along with its franchisees. On March 19, 2018, after the Board vacated *Hy-Brand*, McDonald's and the Board reached a preliminary settlement. A settlement in this case continues to leave unanswered the question as to whether a franchisor, which has no direct control over its franchisees' employees, can be considered a joint employer.

For now, the Board's *Browning-Ferris* decision continues to govern.

Employment Policies

In another hotly debated case, *The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001*, 365 NLRB 154 (2017), the Board revisited its standard for determining the legality of employment policies under the NLRA. The *Boeing* Board, in a 3-2 opinion, abandoned the "reasonably construe" standard—articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether employment policies violate the NLRA—for a standard that would "ensure a meaningful balancing of employee rights and employer interests."

Under the *Lutheran Heritage* standard, an employer rule violated the NLRA if: (1) employees would have reasonably construed the language to prohibit engaging in concerted activities for collective bargaining purposes and other mutual aid and protection (i.e., §7 rights), (2) the rule was promulgated in response to union activity, or (3) the rule had been applied to restrict the exercise of §7 rights. In *Boeing*, the Board discarded this standard because it "prevent[ed] the Board from giving meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules and handbook provisions."

> The 'Raytheon' decision overruled a 2016 ruling of the Obama Board in 'E.I. du Pont de Nemours', and reinstated a standard consistent with the Supreme Court's decision in 'NLRB v. Katz', and subsequent Board decisions, which will be applied retroactively.

Under the new *Boeing* test, the Board evaluates (1) the nature and extent of a challenged rule's potential impact on employees' rights under the NLRA, and (2) the employer's legitimate justifications associated with that rule. This new standard is an effort to strike the right balance between the business justifications for a rule and a rule's interference with employee rights.

Applying this test, the Board found an employer's no-camera rule lawful because the adverse impact on the employees' §7 rights was comparatively slight and outweighed by the justifications associated with the rule, which included the employer's legitimate security interest.

The *Boeing* test will be applied retroactively to pending NLRB cases.

Bargaining Obligations

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the Board restored stability for employers attempting to maintain the status quo following expiration of a collective bargaining agreement. In another 3-2 decision, the *Raytheon* Board held an employer is permitted to make unilateral changes to employment policies consistent with established past practice without first providing unions with notice and the opportunity to bargain. This standard will apply regardless of whether a collective bargaining agreement was in effect at the time the employer initially engaged in the past practice or at the time of the disputed action. Applying this standard in *Raytheon*, the Board found the employer lawfully modified employee medical benefit plans after its collective bargaining agreement expired because such action was consistent with its past practice of making annual modifications to unit employees' costs and/or benefits each year for eleven years.

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consistent with the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), and subsequent Board decisions, which will be applied retroactively. The *DuPont* standard required a determination as to whether a collective bargaining agreement existed at the time the relevant past practices were established. If the past practices were established pursuant to a clause in the collective bargaining agreement permitting unilateral changes, any unilateral change taken when the collective bargaining agreement was no longer in effect—even if consistent with established past practice—required the employer provide the union with notice and the opportunity to bargain over the change before implementation. The *Raytheon* Board found the *DuPont* standard flawed because it undermined "the Board's responsibility to foster stable bargaining relationships," and "distort[ed] the long-understood, commonsense understanding of what constitutes a 'change.'"

Bargaining Units

In *PCC Structurals, Inc. and International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge W24*, 365 NLRB No. 160 (2017), the Board, also in a 3-2 decision, abandoned the "micro-unit" standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases.

Under the prior *Specialty Healthcare* standard, if a union petitioned for an election among a particular group of employees, those employees shared a community of interest among themselves, and the employer took the position that the smallest appropriate unit had to include employees excluded from the proposed unit, the Board would not find the petitioned-for unit inappropriate unless the employer proved the excluded employees shared an "overwhelming community of interest" with the petitioned-for group. *Specialty Healthcare*'s heightened burden was difficult for employers to meet, leading to a dramatic increase in "micro units" consisting of small subsets of employees within an employer's facility instead of more traditional bargaining units. In *PCC Structurals*, the Board found this standard "fundamentally flawed." In particular, the Board noted the "overwhelming community of interest" standard improperly ignored §7 rights of excluded employees by focusing only on §7 rights of the petitioned-for unit, except in rare cases where the employees shared "overwhelming interests."

Under the traditional community-of-interest standard reinstated by the Board *in PCC Structurals*, the Board considers whether the petitioned-for unit of employees "share a community of interest sufficiently distinct from the employees excluded from the proposed unit to warrant a separate appropriate unit." The Board reasoned this standard better effectuates the policies and purposes of the NLRA by permitting the Board to evaluate the interests of all employees—both those within and those outside the petitioned-for unit.

Before the Board in *PCC Structurals* was an employer's request for review of a Regional Director's determination that a 102-person bargaining unit was appropriate, despite the employer's contention that the smallest appropriate unit should include all 2,565 of its employees. Without discussing the appropriateness of the unit, the Board remanded the decision for further consideration in light of its decision.

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The Board currently has four members: Chairman Marvin E. Kaplan (R), Lauren McFerran (D), Mark G. Pearce (D), and William J. Emanuel (R). President Trump's nominee to replace Chairman Miscimarra for the fifth Board seat, John Ring (R), is now subject to congressional confirmation. Additional reversals of Obama-era Board precedent can be expected if and when John Ring is confirmed. Employers are advised to keep apprised of further Board developments in 2018.