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CLIENT ALERT

Hat Trick + 1: NLRB Scores Four Times for Employers as Time Expires on Chairman Miscimarra's Term of Office

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The National Labor Relations Board (NLRB or Board), with its partisan presidential appointees and stubborn aversion to stare decisis, is oft-maligned as particularly practiced in the sport of kicking political footballs. The criticism is earned. Over time, the Board's position on various substantive issues—for example, whether non-union employees enjoy Weingarten rights to co-worker representation during investigatory interviews—has changed with each new administration like the offensive possession in a rain-soaked bowl game. Yet, no stretch in the agency's history has seen more turnovers than the last eight years, when the Board, comprised of appointees from then-President Obama's administration, reversed 91 precedents, comprising more than 4,000 years of NLRB case law.

The Board's recent shifts have in large part (if not entirely) come at the expense of employers and business interests. As readers of these briefings are all too aware, the Obama Board's legacy includes rulemaking and adjudicatory changes allowing for "quickie" union representation elections; permitting union gerrymandering of voting pools to facilitate the organization of "micro" bargaining units; expanding, dramatically, the circumstances in which multiple employers will share liabilities as "joint employers" of a pool of workers; invalidating class and collective action waivers in employment arbitration agreements; imposing greater bargaining obligations on successor employers who seek to institute new employment terms; and mandating that employees be allowed to use business email accounts to engage in unionization efforts (during non-working times) to name a few.

Even when the Obama Board was not overturning prior standards outright, it often interpreted and applied extant precedent in new and expansive ways—always with an eye toward enlarging the rights of individual employees and labor unions and always giving short shrift to employers' competing interests. Most notably, the NLRB and its General Counsel invoked the Board's 2004 decision in Lutheran Heritage Village-Livonia in a series of so-called "rules cases." These rules cases generally involved the Board's flyspecking of employment handbooks and commonplace personnel policies, invariably ending with a Board decision that the challenged work rules and policies were unlawful, even when they made no mention of unions or Section 7 activity, and even in the absence of evidence that they were ever applied to restrict federal labor law rights. Applying Lutheran Heritage, the Obama Board repeatedly held a work rule that was neutral on its face and in application offended the Act nonetheless, if a hypothetical employee could "reasonably interpret" the rule to restrict Section 7 activity.

After eight years of Labor Board aggression, many employers dared hope for a pendulum swing when the Trump administration took office in January 2017. Within a week of his inauguration, President Trump named Philip

Miscimarra—then the lone Republican on the Board—to be the NLRB's Acting Chairman. In the ensuing months, the President moved to fill the Board's two vacant Republican seats. He also removed the "Acting" from Miscimarra's title, making him the Board's new Chair.

But, the Senate, acting with customary "speed," did not confirm the President's nominations for the Board vacancies until August (Member Kaplan) and September 2017 (Member Emanual), both votes occurring on strict party lines. So, for much of his chairmanship, Miscimarra remained distinctly in the minority on the Board. As a result, he spent most of his year as the Board's Chairman writing dissents to majority opinions authored by his two fellow sitting Board members (both holdovers from the Obama era).

Then came last week. In keeping with the football idiom, and with the clock winding down on his tenure as NLRB Chairman, Miscimarra executed a two-minute drill worthy of Tom Brady[1]. Working with a newly-constituted Board—comprised for the first time in eight years of a Republican majority—Miscimarra, joined by Kaplan and Emanual, called an audible. Four of them, in fact.

In the days preceding the December 16 expiration of Miscimarra's term, the Board issued four 3-2 decisions—all with the Board's three Republicans in the majority and its two Democrats relegated to strident dissents. The outgoing Chairman scored quickly and decisively, reversing four of the Board's most-disliked precedents (from the business community's perspective):

- In *The Boeing Company*, the Board overturned the *Lutheran Heritage* "reasonably construe" standard for evaluating facially-neutral handbook policies and work rules. In its place, the Board adopted a new balancing test, which considers: (i) the nature and extent of the potential impact a work rule may have on employee rights under the National Labor Relations Act (NLRA or Act), and (ii) the legitimate business justifications associated with the rule.
- In *Hy-Brand Industrial Contractors, Ltd.*, the Board reversed the Obama-era's expansive joint employer test, and returned to the previous standard under which businesses are held responsible only for workers directly under their control.
- In *PCC Structurals*, the Board overruled its Specialty Healthcare decision, which eased labor union organizing by largely rubberstamping union petitions to represent "micro" bargaining units. The Board majority rejected *Specialty Healthcare* and restored its traditional community-of-interest standard for evaluating a union's petitioned-for bargaining unit.
- In *Raytheon Network Centric Systems*, the Board held that unilateral employer actions that are consistent with an established practice do not constitute a "change" requiring bargaining merely because they may involve some degree of employer discretion. Under the Board's decision, this principle applies regardless whether: (i) a collective bargaining agreement was in effect when the past practice was created, and (ii) no labor contract existed when the disputed actions were taken.

A fuller discussion of these cases follows. In addition, in February, 2018, Winston & Strawn's Labor & Employment group will present an e-lunch on these and other recent developments at the NLRB. We hope you can join us for this presentation, and if you have questions concerning these matters in the meantime, we encourage you to contact any of the labor and employment partners listed below.

The Boeing Company

In *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), the Board promulgated a new balancing test for weighing the permissibility of work rules, personnel policies, and employment handbook provisions. Under the standard set out in its 2004 decision, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, the Board found facially-neutral work rules to be unlawful if employees could "reasonably construe" them to restrict their rights to engage in protected activity under the Act. This standard, and the decisions it spawned, were widely criticized by employer and business groups as over-emphasizing employee and union interests, while marginalizing the legitimate business interests underlying many work rules.

Under the new standard, the Board will balance two factors when evaluating a facially-neutral work rule that is allegedly capable of a reasonable construction to interfere with employees' exercise of NLRA rights: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule."

In accordance with this balancing test, going forward, the Board will categorize work rules into three groups: (1) Category 1 rules are always lawful, either because they cannot be reasonably interpreted to interfere with Section 7 rights, or because any arguable adverse impact they pose to Section 7 rights is outweighed by legitimate justifications; (2) Category 2 rules warrant individualized scrutiny to determine whether they would interfere with NLRA rights, and if so, whether the interference is outweighed by legitimate justifications; and (3) Category 3 rules are always unlawful because they interfere with NLRA rights, and the interference is not outweighed by legitimate justifications.

In the underlying case, the Board determined that the work rule at issue—Boeing's restriction of the use of camera-enabled devices on its property—was a lawful Category 1 rule, as Boeing's security concerns outweighed the minor impact of the rule on the exercise of NLRA rights.

Hy-Brand Industrial Contractors, Ltd.

In *Hy-Brand Industrial Contractors, Ltd*., 365 NLRB No. 156 (Dec. 14, 2017), the Board overturned the expanded test for determining joint employment status established in *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186 (Aug. 27, 2015). Under *Browning-Ferris*, the Board could conclude that two or more entities were joint employers of a particular workforce under the NLRA regardless of whether they ever actually exercised control over the workers' terms and conditions of employment. That is, to find joint-employer status, *Browning-Ferris* required only a finding that: (i) two or more separate employers were both "employers" in the common law sense, and (ii) they shared or co-determined matters governing the essential terms and conditions of employment. Critically, it was not necessary to find that the employers actually exercised direct and immediate control over working conditions; the mere right to control, even if unexercised, was enough. Employers and business groups roundly criticized the Browning-Ferris standard as vague and too expansive in finding joint employment.

The Board majority in *Hy-Brand* agreed with these criticisms, opining that "the *Browning-Ferris* standard is a distortion of common law as interpreted by the NLRB and the courts, it is contrary to the Act, it is ill advised as a matter of policy, and its application would prevent the NLRB from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations." Returning to the pre-Browning-Ferris standard, the Board ruled that joint employment would be found only where two or more "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.'"

Notably, having reinstituted the pre-*Browning-Ferris* standard in *Hy-Brand*, the Board nonetheless affirmed the ALJ's finding that Hy-Brand and Brandt Construction were joint employers. The Board's holding was premised on evidence that both entities exercised joint, direct, and immediate control over a group of employees. As such, both entities were jointly and severally liable for the unlawful discharge of seven striking employees.

Board members Pearce and McFerran dissented, complaining that the "resurrected standard not only is impossible to reconcile with the common law of agency, it also violates the explicit policy of the NLRA: to 'encourag[e] the practice and procedure of collective bargaining.'"

The return to the pre-*Browning-Ferris* standard for determining joint employment is expected to clarify companies' relationships with, and obligations to employees of contractors and franchisees. It is unclear what effect the Board's decision in *Hy-Brand Industrial Contractors, Ltd*. will have on the appeal of the *Browning-Ferris*, currently pending before the U. S. Court of Appeals for the District of Columbia Circuit, or on the Save Local Business Act (H.R. 3441), a bill intended to permanently change the joint employment standard, which is currently pending in the Senate.

PCC Structurals

In *PCC Structurals*, the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), which required employers challenging a union's petitioned-for bargaining unit to establish that any excluded workers share "an overwhelming community of interest" with those in the union's proposed unit. As the Board majority in PCC Structurals observed, under Specialty Healthcare, "the [union's] petitioned-for unit is deemed appropriate in all but rare cases."

Specialty Healthcare was widely criticized by employers and business groups as easing union organizing by allowing unions to petition for representation elections among "micro-units." By doing so, organizing unions could seek to gerrymander the prospective voting pool to include only employees in shifts, departments, or classifications where the union believed it had sufficient support to carry a majority. Then, after gaining representative status for employees in a micro-unit, the union would have a "nose under the tent," facilitating further organizing among the workforce at large.

In application, this organizing strategy resulted in fractured workforces, often to an absurd degree. For instance, in *Macy's, Inc.*, 361 NLRB 12 (2014), the United Food and Commercial Workers Union filed a petition seeking to represent a bargaining unit consisting only of "employees working on the first floor in cosmetics and women's fragrances and those employed on the second floor selling men's fragrances" at Macy's department store in Saugus, Mass. Macy's objected to the proposed unit, arguing that it included only 41 of 120 sales employees working at the Saugus store. This proposed fracturing of the sales force made no sense, Macy's argued, as it was undisputed that all sales employees shared almost identical terms and conditions of employment. Moreover, organizing a selected portion of one store's selling associates into multiple collective bargaining units would be impractical and an impediment to providing consistent levels of customer service.

Applying *Specialty Healthcare*, the Board rejected Macy's position, concluding that the cosmetics and fragrances department employees were "readily identifiable" based on "classifications and functions." Moreover, they represented all nonsupervisory employees in a particular department—i.e., not a "sub-department," of a larger department or "an arbitrary segment of a department." Accordingly, Macy's failed to show that employees selling non-cosmetics products on the same selling floor shared an "overwhelming community of interest" with the sales employees in the union's preferred unit. For more, see our briefing, NLRB Rules That Micro-Unit of Macy's Workers Share a "Community of Interest."

PCC Structurals jettisons the *Specialty Healthcare* "overwhelming community of interest" standard, and returns to the traditional community-of-interest standard in examining whether workers in a 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." Employers should expect that even under the traditional community of interests standard, the Board will give some level of deference and consideration to a union's petitioned-for unit. However, on a relative scale, the traditional standard should make it somewhat easier for employers to contest union efforts to gerrymander voting pools in representation cases by petitioning for an election only among workers in a fractured or micro-bargaining unit.

Once again, Board members Pearce and McFerran dissented, asserting the "majority's rejection of the *Specialty Healthcare* framework reflects a failure to engage in the sort of reasoned decision-making demanded of the Board and other administrative agencies."

Raytheon Network Centric Systems

In *Raytheon Network Centric Systems*, Case No. 25-CA-092145 (Dec. 15, 2017), the Board ruled that employers have the right to take unilateral actions affecting terms and conditions of employment, provided that those actions are not a substantial departure from past practice, regardless of the circumstances under which those past practices developed. In so ruling, the Board rejected its 2016 holding in E.I. *du Pont de Nemours*, and reinstated the rule previously recognized in *Shell Oil* and its progeny.

The *Raytheon* case arose in 2013, when following the expiration of the parties' collective bargaining agreement, Raytheon, over the union's objections, unilaterally implemented several modifications to its employee benefit plan. The union filed unfair labor practice charges, arguing that Raytheon could not modify the benefit plan without

bargaining. Relying on the Board's decision in *DuPont*, an NLRB Administrative Law Judge agreed with the union and held that Raytheon's unilateral implementation of changes to the benefit plan violated the Act.

In *DuPont*, the Board held that discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause are unlawful. In so holding, *DuPont* overruled the Board's prior precedent, which held that employers are privileged to make unilateral changes without regard to the survival of a management rights clause. The Board majority in *DuPont* claimed its new standard was supported by the Supreme Court's decision *NLRB v. Katz*, which holds that employers cannot make changes in employment terms without first giving the union notice and an opportunity to bargain. The Board also rejected the employer's past practice defense, concluding that even though the changes were in line with the company's long-standing practice, they were nevertheless unlawful because they were "informed by a large measure of discretion." Thus, the Board concluded that following the expiration of a collective bargaining agreement, an employer is prohibited from continuing a practice of making the same discretionary unilateral changes that it was permitted to make under the expired agreement's management rights clause.

In *Raytheon Network Centric Systems*, the Board majority held that *DuPont* "improperly departed from fundamental principles governing past practice and the duty to bargain." The Board first determined that *DuPont* ignored commonsense understanding and "dramatically altered what constitutes a 'change'" under *Katz*. Specifically, the Board found that when evaluating a "change," *DuPont* wrongfully scrutinized whether a collective bargaining agreement existed when the employer's prior actions created the past practice and whether the collective bargaining agreement contained language expressly permitting the actions in question. Instead, the Board explained that, when evaluating whether a particular action constitutes a change, the focus should only be on "whether the employer's action is similar in kind and degree to what the employer did in the past." In short, the Board held, the determination of whether an employer's action constitutes a change does not depend on whether past actions were permitted by a collective bargaining agreement.

Additionally, the Board ruled that *DuPont* was incompatible with "fundamental purposes of the Act" insofar as the *DuPont* rule needlessly added challenges to contract negotiations by creating new obligations to negotiate prior to the employer simply taking actions in continuation of what it had previously done. The Board also noted that its holding would have no effect on the duty of employers to bargain upon request over any and all mandatory subjects of bargaining.

Applying its new rule, the Board held that *Raytheon* did not violate the Act by changing employees' health care benefits, as the change was consistent with its past practice of implementing unilateral annual adjustments during the enrollment period. The Board also stated that its new rule would apply retroactively, concluding that "[i]n reliance on *DuPont*, parties may have engaged in bargaining that our decision today renders unnecessary, but such bargaining is merely rendered supererogatory by our decision, not unlawful."

Board members Pearce and McFerran dissented, writing that the majority decision "gives employers new power to make unilateral changes in employees' terms and conditions of employment after a collective bargaining agreement expires" … "[w]ith little justification other than a change in the Board's composition." In response to this criticism, the Board majority stated that its decision is consistent with *Katz*, and that it merely approved and reinstated prior precedent after a "reasoned re-evaluation and rejection of the prior Board's decision in *DuPont*."

* * *

Going forward, employers should recognize that these latest NLRB decisions are unlikely to be the final word on these subjects. All four cases were decided by 3-2 split decisions, and all were accompanied by vigorous dissents. Former Chairman Miscimarra's seat is now empty, and the Board's current membership is deeply and evenly-divided on these and other substantive issues. Given that the Board typically decides cases by three-member panels, the precise contours of any future applications of these decisions may well depend on the particular panel make-up deciding the case. In addition, future changes in the administration and the Board's composition could lead to still further reexamination of these decisions. While these particular games have ended, the National Labor Relations Football League plays a long season.

[1] Note, the author of this briefing hails from Winston's Chicago office and would have liked nothing better than to make an enthused, positive comparison to a Chicago Bears quarterback here. Alas.

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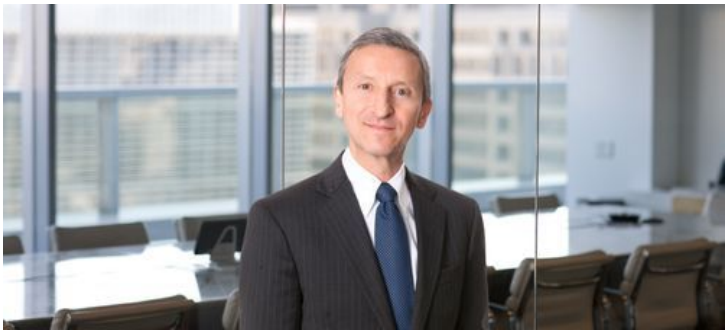

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