

BCLPatWork.com

## NLRB UPDATE: TRUMP BOARD WASTES NO TIME OVERTURNING OBAMA-ERA PRECEDENT

Dec 26, 2017

With two appointments by President Trump, the National Labor Relations Board (NLRB) had a Republican majority for several months in 2017, for the first time in ten years. The “Trump Board” wasted no time overturning Obama-era precedents – and has signaled that there is much more to come.

### Harder for Employers to be Declared “Joint Employers”

In *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 15, 2017), the Board overruled the joint-employer test announced in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015). In *Browning-Ferris*, the Obama Board had departed from decades of precedent to declare that two unrelated employers would be deemed “joint employers” for purposes of the National Labor Relations Act (NLRA) if one had reserved the right to exercise direct or indirect control over the employees of the other, even if that control was never actually exercised, and even if the control was only “limited and routine.” Under the traditional standard, now restored by the Board in *Hy-Brand*, joint employer status will be found only where the requisite control is actually exercised, is direct and immediate, and is more than merely limited and routine.

### Harder for Unions to Justify “Micro-Units”

In *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), the Board overruled the Obama-era decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), which had permitted labor unions to petition for elections in “micro units” of cherry-picked employees unless the employer could prove that employees excluded from that unit share “an overwhelming community of interest” with those in the unit, “such that there ‘is no legitimate basis upon which to exclude’” the other employees. The Trump Board restored the standard applied by the Board “throughout nearly all of its history,” which focuses on “whether the employees in a petitioned-for group 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.” In other words, rather than requiring the employer to prove that excluded employees should be included, the Board will once again require the union to prove that excluded employees should not be included.

## Easier for Employers to Make Unilateral Changes Consistent with Past Practice

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017), the Trump Board overruled *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) and restored the right of employers to make unilateral changes to terms and conditions of employment that are consistent with past practice. While Section 8(a)(5) of the NLRA generally precludes employers from making unilateral changes in mandatory subjects of bargaining until the employer has first bargained to impasse with the union, the concept of the “dynamic status quo” allows employers to unilaterally modify terms and conditions of employment – such as by subcontracting certain work or making annual adjustments to wages or benefits – in a manner consistent with its past practice of making such changes.

## Easier for Employers to Adopt and Enforce Workplace Policies

In *Boeing Company*, 365 NLRB 154 (Dec. 14, 2017), the Board rejected the Obama Board’s approach to reviewing employment policies. Relying on one prong of a test articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Obama Board had struck down “a multitude of work rules, policies and employee handbook provisions” on the grounds that “employees would reasonably construe the language to prohibit Section 7 activity” – even when the policy was not adopted for that purpose or applied in such a way. (Rights under Section 7 of the NLRA include the right to unionize, to bargain collectively, and to engage in other concerted protected activity.) The Obama Board had used the “Lutheran Heritage” standard to insert itself into non-union workplaces to an unprecedented degree, striking down a wide range of commonplace employment policies such as rules prohibiting use of cameras in the workplace and requirements that employees work harmoniously and behave professionally. Under the new test announced in *Boeing Company*, the Board will now strike a balance between the rights of employees and the needs of employers by evaluating employment policies based on two factors: “(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.”

## More to Come

Finally, the Board has signaled that the reversal of Obama-era precedent will continue, once President Trump restores a Republican majority by replacing Chairman Miscimarra, whose term expired on December 16, 2017. Among other things:

- On December 14, 2017, the Board published a Request for Information (RFI) in the Federal Register, asking for public input on the Board’s 2014 Election Rule, which established the so-called “ambush elections,” union representation elections that were held on as little as nine days’ notice. The RFI asks for comment as to whether the 2014 rule should be retained, modified or rescinded entirely. The mere asking of the question strongly suggests that the current rule has a short life expectancy.

- On December 1, 2017, the new General Counsel to the NLRB, appointed by President Trump, issued Memorandum GC 18-12 directing regional directors and others to submit to the Division of Advice in the General Counsel's Office all cases involving "significant legal issues." As defined in the Memo, such issues specifically include "cases over the last eight years that overruled precedent and involved one or more dissents." One apparent purpose of the Memo is to quickly identify appropriate cases in which the Trump Board may overrule additional decisions of the Obama Board. The Memo also provides examples of issues on which the Office of the General Counsel "might want to provide the Board with an alternative analysis" – which includes many of the Obama Board's most controversial decisions.

In addition to Chairman Miscimarra, the President will also have the opportunity to replace Member Pearce, an appointee of President Obama, whose term expires in August 2018.

If past is prologue, 2018 should prove to be a fascinating chapter for U.S. employers.

*Bryan Cave LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess their obligations under the National Labor Relations Act and deal with labor relations issues. If you or your organization would like more information on the NLRB or any other employment issue, please contact an attorney in the Labor and Employment practice group.*

## MEET THE TEAM



### L. Anthony George

Denver

[anthony.george@bclplaw.com](mailto:anthony.george@bclplaw.com)

+1 303 866 0287

---

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon ([kathrine.dixon@bclplaw.com](mailto:kathrine.dixon@bclplaw.com)) as the responsible attorney.

