December 19, 2017

NLRB Reverses Significant Precedents Impacting Employers

The National Labor Relations Board (NLRB) issued several decisions between December 11 and December 15, 2017, reversing various precedents instituted by the NLRB appointed by former President Barack Obama. These decisions come on the heels of new NLRB General Counsel Peter Robb issuing pro-employer guidance to the agency's investigative and prosecutorial wings on December 1, 2017.

These decisions under the National Labor Relations Act (the Act) concern joint employers, employer handbooks and workplace policies, micro-units, settlement of NLRB cases, and the duty to bargain. They overturn prior precedent that made it easier for unions to organize and for both unionized and nonunionized employees to exercise their rights under the Act. They have wide applicability and will have a profound effect on employers moving forward.

Joint Employer

- In *Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co*, 365 NLRB No. 156 (Dec. 14, 2017), the NLRB overturned the 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), that held two employers are joint employers of the same group of employees when they maintain a reserved right of control, exert only "indirect control" of the workforce or where their control is exercised in a "limited and routine" manner. In reversing the *Browning-Ferris* decision, the NLRB returns to the prior standard, which required that an employer maintain "direct and immediate" control over employees' terms and conditions of employment in order to be considered their employer. The NLRB found that the *Browning-Ferris* decision runs contrary to the Act's purpose of fostering stability in labor-management relations in the United States.

Employer Handbook Rules and Workplace Policies

- In *The Boeing Co. and Society of Professional Engineering Employees in Aerospace IFPTE Local 2001*, 365 NLRB No. 154 (Dec. 14, 2017), the NLRB overturned its 2004 decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), which held an employer handbook rule is unlawful if an employee would "reasonably construe" the language to interfere with their Section 7 rights under the Act. Under this new ruling, the NLRB will balance interests between the employer and the employee by classifying rules into three categories. The first category contains rules that are inherently lawful because they could not be construed to interfere with an employee's rights to engage in protected, concerted activity or because such interference is outweighed by competing employer business justifications. The second category contains rules that are lawful dependent upon their application. The third category contains rules that are unlawful under all circumstances because they interfere with employees' rights to engage in protected, concerted activity and could never be outweighed by an employer's business justifications.

Micro-Units

- In *PCC Structurals Inc. and International Association of Machinists & Aerospace Workers AFL-CIO District Lodge W24,* 365 NLRB No. 160 (Dec. 15, 2017), the NLRB reversed its 2011 decision in *Specialty Healthcare*, 357 NLRB 934 (2011)

enfd. sub. nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir.2013), that required employers to prove workers they want included within a petitioned-for unit in their workplace share an "overwhelming" community of interest with those that the union proposed as a group. In reversing this decision, the NLRB returns to its prior standard articulated in *United Operations, Inc.*, 338 NLRB 123 (2002), where it determines whether the employees within the petitioned-for unit share a community of interest "sufficiently distinct" from excluded employees in order to warrant their own unit.

Settlement Proposals

- In *UPMC and UPMC Presbyterian Shadyside and UPMC Presbyterian Hospital and UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania CTW, CLC*, 365 NLRB No. 153 (Dec. 11, 2017), the NLRB ruled that NLRB judges can sign off on partial settlement proposals even where the agency's general counsel and the case's charging party object. This action restored the NLRB's "reasonableness" settlement standard set forth in *Independent Stave*, 287 NLRB 740 (1987).

Duty to Bargain Over Changes

- In *Raytheon Network Centric Systems and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO,* 365 NLRB No. 161 (Dec. 15, 2017), the NLRB reversed its 2016 decision issued in *DuPont*, 364 NLRB No. 113 (2016), that held employers must bargain with unions before implementing revisions to terms and conditions of employment even if they have a prior history of making similar changes. For 50 years prior to the ruling in *DuPont*, the Supreme Court held in *NLRB v. Katz,* 369 US 736 (1962), that unionized employers could not make unilateral changes to terms and conditions of employment for their workers without providing notice to the union and providing an opportunity for them to bargain. In 1964, the NLRB further found in *Shell Oil*, 149 NLRB No. 22 (1964), that revisions to terms and conditions of employment were not a "change" if they were consistent with the employers' past practice. *DuPont* overruled *Shell Oil* to the extent that the past practice was a function of an expired management's rights clause or if the "change" was one within the employer's "discretion." The *Raytheon* decision returns to the *Katz and Shell Oil* precedent.

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